No. 90-918-CFX
Status: GRANTED

Title: Christine Franklin, Petitioner
v.
Gwinnett County Public Schools and William Prescott

Docketed:
December 10, 1990

Court: United States Court of Appeals
for the Eleventh Circuit

Counsel for petitioner: Weinstock,Michael, Klein,Joel I.

Counsel for respondent: Bedinger III,Frank C., Pearson III,Albert M.

NB. Dec. 9 was SUNDAY. Ptn mailed Dec. 10, 1990.

Entry	Date	Note	Proceedings and Orders
1	Dec 10 1990	G	Petition for writ of certiorari filed.
3	Jan 10 1991	X	Brief of respondents Gwinnett County Public Schools, et al. in opposition filed.
2	Jan 16 1991		DISTRIBUTED. February 15, 1991
4	Feb 19 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
5	May 20 1991		Brief amicus curiae of United States filed.
6	May 21 1991		REDISTRIBUTED. June 6, 1991
7	Jun 10 1991		Petition GRANTED.
			**********
9	Jul 2 1991		Order extending time to file brief of petitioner on the merits until August 14, 1991.
10	Aug 2 1991		Certified copy of Court of Appeals briefs received.
15	Aug 2 1991		Record filed.
		*	Certified copy c.a. briefs received.
11	Aug 14 1991		Brief amici curiae of American Council of the Blind, et al. filed.
12	Aug 14 1991		Brief amici curiae of National Women's Law Center, et al. filed.
13	Aug 14 1991		Brief amicus curiae of Lawyers' Committee for Civil Rights filed.
14	Aug 14 1991		Brief of petitioner Christine Franklin filed.
16	Aug 23 1991		Record filed.
		*	Received certified original record from USDC, N.D. GA.
17	Sep 16 1991		Brief of respondent Gwinett County School District filed.
19	Sep 24 1991	G	Motion of petitioner to dispense with printing the joint appendix filed.
18	Sep 30 1991	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Oct 7 1991		Motion of petitioner to dispense with printing the joint appendix GRANTED.
21	Oct 7 1991		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Oct 15 1991		SET FOR ARGUMENT WEDNESDAY, DECEMBER 11, 1991. (1ST CASE)
23	Oct 16 1991		Reply brief of petitioner Christine Franklin filed.
24	Oct 24 1991		CIRCULATED.

Entry	Date	Note	Proceedings and Orders
25	Dec 11 1991		ARGUED.

90-9180

No. _____

In The

Supreme Court of the United States

October Term, 1990

CHRISTINE FRANKLIN,

Petitioner,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a Local Education Agency (LEA);
DR. WILLIAM PRESCOTT, an Individual,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* allows victims of intentional discrimination to recover compensatory damages under the authority of *Guardians Ass'n v. Civil Service Commission of the City of New York,* 463 U.S. 582 (1983).

II.

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1618 *et. seq.*, which is based on Congress' authority to enforce the Fourteenth Amendment, authorizes recovery of compensatory damages for intentional violations of this statute.

PARTIES

Petitioner-Plaintiff below is an individual who alleges that she was subjected to sexual discrimination in violation of Title IX of the Education Amendments of 1972. Respondent is Gwinnett County Public Schools. Gwinnett County Public Schools is a local education agency and includes North Gwinnett High School where the alleged sexual discrimination took place. Respondent, Dr. William Prescott, was the band director at North Gwinnett High School. He has been sued in his individual capacity.

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In The

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CHRISTINE FRANKLIN,

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GWINNETT COUNTY PUBLIC SCHOOLS,
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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported: *Franklin v. Gwinnett County Schools, a Local Education Agency (LEA), Dr. William Prescott, an Individual,* 911 F.2d 617 (11th Cir. 1990), this Opinion is set forth at Appendix A. The Opinion of the United States District Court for the Northern District of Georgia is not reported. It is attached at Appendix B.

JURISDICTION

The judgment sought to be reviewed was entered by the Eleventh Circuit Court of Appeals on September 10, 1990. This judgment is set forth in Appendix C. This Court has jurisdiction to review the judgment of the Eleventh Circuit under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

a) Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (1988), which provides that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

b) Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4(1988) which provides that "No person in the United States shall, on the basis of race, color, or national origin, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

c) The Fourteenth Amendment of the United States Constitution.

d) Title VII of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW.

On August 1, 1988, Christine Franklin, a high school student residing in Gwinnett County, Georgia, filed a Complaint against Gwinnett County Public School with the Office of Civil Rights, United States Department of Education, alleging that she had been subjected to sexual discrimination in violation of Title IX of the Education

Amendments of 1972 (20 U.S.C. § 1681, *et seq.*). After a six (6) month investigation, the Office of Civil Rights (hereinafter referred to as "OCR"), on December 14, 1988, found Gwinnett County Public Schools to be in violation of Title IX because Ms. Franklin had been subjected to verbal and physical abuse of a sexual nature. Gwinnett County Public Schools was also found to be in violation of Title IX because it failed to implement a grievance procedure in accordance with Title IX and because Dr. William Prescott (hereinafter referred to as "Prescott"), a former band instructor at Ms. Franklin's school, attempted to intimidate Ms. Franklin into dropping her charges.

On December 28, 1988, Ms. Franklin filed an action in the United States District Court for the Northern District of Georgia against the Gwinnett County Public Schools (hereinafter referred to as "District") and Dr. William Prescott. Ms. Franklin alleged that the District and Dr. Prescott "intentionally discriminated" against her based upon her gender in violation of 20 U.S.C. § 1681, *et seq.* Without answering the Complaint, the Defendants filed a Motion to Dismiss the action for failure to state a claim upon which relief could be granted. Defendants argued, among other things, that compensatory relief was unavailable for violations of Title IX of the Education Amendments of 1972 for intentional discrimination. The District Court agreed and on May 1, 1989, dismissed Ms. Franklin's Complaint for failure to state a claim upon which relief could be granted. The District Court entered its Order on May 5, 1989. Ms. Franklin timely filed her Notice of Appeal and asserted in the Court of Appeals that the judgment of the District Court should have been reversed and the case remanded for additional proceedings.

On September 10, 1990, the Court of Appeals for the Eleventh Circuit affirmed the District Court's dismissal

and entered its Order. Petitioner asserts this timely petition for Writ of Certiorari and this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

B. FACTS.

The following facts were submitted to the Office for Civil Rights, U.S. Department of Education. In accordance with *Conley v. Gibson*, 355 U.S. 41, 45-46, 48 (1957), Plaintiff submits that these facts should be considered as true.

Commencing in September 1986, Andrew Hill (hereinafter referred to as "Mr. Hill"), Christine's 9th grade Economics teacher, befriended her by showing her favoritism in the form of allowing her to grade the class' papers and record the grades. In addition, during the regular classroom hours as all the students completed daily assignments, Mr. Hill took Ms. Franklin to his office in the back of the classroom, which was segregated from the main school in a building known to the students as the "fieldhouse."

While Ms. Franklin and Mr. Hill were together in his office, the two engaged in conversation which, at first, consisted of ordinary topics, including Ms. Franklin's grades, her participation in the school band, her studies, and her boyfriend's activities. Toward the end of the semester, however, Mr. Hill began to direct the conversation toward intimate, sexual topics. For example, Mr. Hill asked Ms. Franklin if she and her boyfriend had engaged in sexual intercourse and whether Ms. Franklin would consider "doing it" with an older man. Mr. Hill opined that older men "knew more than teenage boys" and that Ms. Franklin would have more "fun" having relations with an experienced man. Mr. Hill told Ms. Franklin that the way to be popular with the male students at the high school was to "do it" with a "guy" on the first or second date.

In addition to his inquiries into Ms. Franklin's intimate sexual relationships, Mr. Hill told her that he and

his wife were having sexual problems and that other high school girls "just like Christine" had offered to "help" him with his problem. Specifically, Mr. Hill told Ms. Franklin that his wife declined to have sexual relations with him after delivering a child. Mr. Hill attempted to elicit sympathy from Ms. Franklin, telling her that his wife had sought help for this mental problem.

In addition to the sexually suggestive conversations, Mr. Hill gained Ms. Franklin's attention and favor by flattery. He told her that she "looked good." On another occasion, Mr. Hill told her "you look so good, you better not get me excited." Frequently, the "talks" between Mr. Hill and Ms. Franklin lasted into the next class period. Mr. Hill provided Ms. Franklin with notes to excuse her lateness or would accompany her to the next classroom, interrupt the class, and tell the teacher, "she was with me."

As a result of the frequent association between Mr. Hill and Ms. Franklin, rumors of sexual activity between the two spread throughout the student body. In October 1986, while the Principal was away at a meeting, Mr. Hill approached John David Martis, an Assistant Principal, ostensibly for advice. Mr. Hill told Mr. Martis that Ms. Franklin had been "hanging around" after class, purportedly seeking advice for personal problems involving her relationship with her boyfriend. Mr. Hill stated to Mr. Martis that he thought Ms. Franklin was pregnant. Mr. Hill also added that other female students in the Economics class had begun to make a "big deal" about him talking with Ms. Franklin after class. According to Mr. Martis, Mr. Hill said that he "hated" to turn his back on the girl, "but that he was getting worried about generating rumors among the students."

After hearing of the rumors of sexual conduct between she and Mr. Hill, Ms. Franklin became distressed and approached Michael Blackwood, a teacher in charge of a student writer's club. In a written statement prepared for school authorities, dated March 30, 1988, Mr.

Blackwood acknowledged that he spoke with Ms. Franklin. Ms. Franklin told Mr. Blackwood that she was unsure whether to continue seeing her boyfriend, who has purportedly had relations with another person. Mr. Blackwood also stated that during the same conversation, Ms. Franklin indicated she felt uncomfortable with Mr. Hill because he closed his office door while speaking to her on personal topics.

Ms. Franklin, on the other hand, has stated that the conversation with Mr. Blackwood about Mr. Hill took place subsequent to the discussion concerning her boyfriend. Ms. Franklin stated that when she approached Mr. Blackwood, she was crying and told him that Mr. Hill was making her uncomfortable with his questions about her personal life and that he always shut the door when he spoke with her.

In October 1986, a student placed an anonymous note on Ms. Franklin's desk in her Language Arts class. The note read, "I heard that Coach Hill is good. Is he better than Doug?" Immediately thereafter, Ms. Franklin went to Mr. Hill's classroom at the fieldhouse, asked him to step outside, showed him the note, and expressed her dissatisfaction with the rumors that were circulating around the school. Mr. Hill asked Ms. Franklin to remain calm, but she remained excited and distressed and the conversation carried into the parking lot. After Ms Franklin turned and walked away, Mr. Hill grabbed her arm tightly, pulled her toward him, and kissed her very hard on the mouth. Ms. Franklin freed herself from his grasp and walked away.

After Ms. Franklin returned to band class late, she and her boyfriend had an argument regarding the rumors of sexual activity between she and Mr. Hill. Dr. Prescott, the band leader and a Defendant herein, separated Ms. Franklin and her boyfriend and spoke with Ms. Franklin's boyfriend about the problems with Mr. Hill. The boyfriend told Dr. Prescott that Mr. Hill was asking Ms. Franklin personal questions about the latter's sexual

experiences. Dr. Prescott assured the boyfriend that he would write Mr. Hill a letter indicating that such behavior was unprofessional and unbecoming of a teacher and that Dr. Prescott would be forced to inform a "higher authority" if Ms. Franklin reported late for class or if Mr. Hill asked her questions about her sexuality.

During the spring 1987 school semester, Mr. Hili made similar sexual inquiries of another female student, Courteny Jans. During the spring 1987 school semester, Ms. Jans was a student in Mr. Hill's Economics class. Mr. Hill showed Ms. Jans favoritism and she was perceived as a "teacher's pet." After receiving an inordinate amount of attention from Mr. Hill, Ms. Jans thought of him as a friend and sought his counsel for a personal problem involving a boyfriend.

During a conference with Mr. Hill, he asked Ms. Jans several intimate, personal questions and made intimate, personal statements that went beyond the scope of ordinary counseling. For example, Mr. Hill asked Ms. Jans, "how do you keep your boyfriend satisfied?" Thereafter, Mr. Hill opined that if she kept her boyfriend sexually "satisfied," he would not have assaulted her. Mr. Hill also asked whether Ms. Jans gave her boyfriend oral sex. In addition, Mr. Hill stated, "guys are guys. They need to be satisfied," and "sleep with guys to be popular." At no time did Mr. Hill offer Ms. Jans genuine counseling or refer her to the guidance counselor for assistance.

In early July of 1987, Mr. Hill telephoned Ms. Franklin at her home, informed her that his wife was leaving for the weekend and suggested that he and Christine get together during that time. Ms. Franklin declined. Ms. Franklin maintains that Mr. Hill advised her to tell her mother that he was calling to check on band practice.

When school began in autumn of 1987, Mr. Hill began approaching Ms. Franklin. Mr. Hill surreptitiously obtained Ms. Franklin's class schedule and waited for her to emerge from her classroom after the class ended. Mr. Hill walked with Ms. Franklin throughout the school and

engaged her in conversation. Mr. Hill also sent various teachers notes to excuse Ms. Franklin from her classes. Mr. Hill excused Ms. Franklin from her third period English class, her fifth period History class, and her sixth period Geometry class so he could engage Ms. Franklin in conversation in the fieldhouse. None of these teachers asked Mr. Hill why he singled out Ms. Franklin to be excused from their classes.

In early October of 1987, Mr. Hill began making inquiries into the intimate, sexual life of Patricia Carder, a Physical Science and Special Studies student. Mr. Hill stated, "to hold on to your man, you'll have to keep him satisfied," "be sure to keep him warm," and "I bet you could do a good job keeping him warm." Mr. Hill also asked Ms. Carder if she gave her boyfriend oral sex. On Tuesday, November 3, 1987, Ms. Carder reported Mr. Hill's behavior to Wendy Larmore, a teacher, who asked Ms. Carder to keep written documentation. Ms. Carder also stated that Mr. Hill wanted to walk her to her next class.

On Friday, November 11, 1987, Mr. Hill walked Ms. Carder to class. After a male friend said "hello," Mr. Hill asked Ms. Carder if she was keeping him "satisfied." On November 13, 1987, Carder's Physical Science class went to the fieldhouse. Mr. Hill approached Ms. Carder and directed her to come into the fieldhouse and talk about her "problems." She complied. Mr. Hill went to the back of the fieldhouse while she remained in the front area. When he did not return, Ms. Carder walked out to the bleachers. As she made her way toward the bleachers, Mr. Hill asked Ms. Carder why she did not go in the back of the fieldhouse with him. On November 23, 1987, Mr. Hill walked Ms. Carder to her next class. While walking, Mr. Hill grabbed her by the neck. Ms. Carder asked him not to grab her because it "tickled." Mr. Hill replied, "since you're ticklish there, you must be ticklish in other places."

During the same month [October 1987], Ms. Jans and another student, Christine McElvaine, approached Mr. Martis seeking support for a rape crisis counseling program at the high school. After Mr. Martis asked the students whether the school needed such a program, Ms. Jans responded that rape was a frequent occurrence and even a faculty member had propositioned female students. Mr. Martis, in his statement to authorities, said:

> She went on to say that once when she was talking with Coach Hill about her relationship with her boyfriend, he had asked her what she did to take care of him. She said the conversation quickly degenerated to his [Coach Hill] asking her for oral sex [vulgarism deleted].

Mr. Martis responded with a reprimand:

> At this point, I cautioned her about the seriousness of what she was saying and asked her to be very certain about what she was saying. When I asked her if she was, in fact, making a formal charge against Coach Hill, she said she was not . . .
>
> I told her she should think seriously before repeating her remarks regarding Coach Hill unless she or her parents wanted to make a formal charge to Dr. Lewis, the Principal.

In or about October 1987, Mr. Hill personally appeared at Ms. Franklin's third period English class and excused her from that class. Lori McDonough, Ms. Franklin's third period teacher, acknowledged that approximately "midway in" through the class, Mr. Hill came to her room and asked her if he could "borrow" Ms. Franklin for a while. Ms. McDonough stated that because Ms. Franklin was a good student and because she assumed that Mr. Hill needed her to help him with something, she let Ms. Franklin go. Mr. Hill escorted Ms. Franklin to the fieldhouse, locked the door, removed Ms. Franklin's clothing, and engaged in sexual relations with her. After the act of intercourse was completed, Mr. Hill gave Ms.

Franklin a pass to return to Ms. McDonough's English class.

Ms. Franklin returned to Ms. McDonough's English class with her clothes disheveled, her hair a mess, crying, and visibly shaken and upset. While Ms. McDonough denies that Ms. Franklin ever returned to class physically shaken and upset, certain students have stated that they observed Ms. Franklin leave Ms. McDonough's English class and return visibly shaken and upset.

Approximately one (1) month later, Mr. Hill personally interrupted Ed Winn's fifth period History class and directed Ms. Franklin to accompany him to the fieldhouse. When Ms. Franklin arrived at the fieldhouse, she was worried of Mr. Hill's intentions. Sensing her reluctance to submit to his sexual desires, Mr. Hill questioned Ms. Franklin by stating, "you wouldn't want Doug [Ms. Franklin's boyfriend] to find out about us, would you?" and then stated "your mother could also find out about us." Thereafter, Mr. Hill grabbed Ms. Franklin by the lapels of her jacket, removed her clothing, and once again engaged in sexual intercourse with her. He then gave her a pass to return to Mr. Winn's fifth period History class.

Sometime after the second act of intercourse, Mr. Hill apologized to Ms. Franklin in the parking lot of the school, stating that "all he did was care" for her and that she "knew he wasn't going to hurt her." In a different conversation, Mr. Hill approached Ms. Franklin in the school hallway and told her that she had nothing to worry about because he had had a vasectomy.

Ms. Franklin asked both Mr. Winn and Ms. McDonough not to allow Mr. Hill to excuse her from their classes again.

On December 3 or 4, 1987, Wendy Larmore reported Mr. Hill's behavior toward Patricia Carder, to the female guidance counselor, Jenny Lacy. Ms. Larmore showed her the documentation Ms. Carder had compiled. Ms. Lacy counseled Ms. Carder and then called Dr. Owen, the Assistant Principal. Dr. Owen advised Ms. Lacy to take

the matter to Dr. Lewis, the Principal. Ms. Lacy and Ms. Larmore met with Dr. Lewis and explained the situation. Dr. Lewis said he would "talk" to Mr. Hill.

That evening, Dr. Owen, Joel Mannis, an Assistant Athletic Director at the school, and Mr. Hill had dinner. Mr. Mannis reported that Dr. Owen "told Mr. Hill that problems were developing regarding the fact that some female students reported that Mr. Hill was making improper remarks toward them." Dr. Owen told Mr. Hill to meet with Dr. Lewis and Ms. Lacy to confront the problem and lay it to rest. However, Mr. Hill absented himself the next two (2) school days.

Approximately two (2) weeks before Christmas 1987, Mr. Hill sent a student with a note to excuse Ms. Franklin from Mr. Winn's fifth period History class. Mr. Hill waited outside Ms. Franklin's classroom. Mr. Hill took Ms. Franklin to the press box of the school stadium, telling her it was a "safe place to talk." Once inside the press box, Mr. Hill once again removed Ms. Franklin's clothing and engaged in sexual intercourse with her.

Mr. Hill also threatened Ms. Franklin stating, "yes, those stairs look mighty steep, don't they?" Ms. Franklin was once again given a pass to return to her next period classroom.

Later, in January 1988, Ms. Jans approached Ms. Franklin and inquired about the rumors of sexual activity between Ms. Franklin and Mr. Hill. At first, Ms. Franklin declined to discuss the matter. However, Ms. Jans persisted and Ms. Franklin relented. On Monday, February 22, 1988, Ms. Franklin reported the sexual activity to Lori McDonough. Ms. McDonough eventually persuaded Ms. Franklin to tell the story to Ms. Lacy, a guidance counselor. Ms. Lacy and Ms. McDonough thereafter met with Ms. Franklin on February 23, 1988, and relayed the information to Dr. Lewis on February 29, 1988. Commencing sometime between March 2, 1988, and March 14, 1988, Dennis Foster, Director of Security, and George

Thompson, an Administrative Official from the School Board, began an investigation into the incident.

On March 14, 1988, Ms. Franklin met with Dr. Owen and reaffirmed the allegations she made against Mr. Hill. After this conversation, Ms. Franklin reported to Ms. Lacy that Dr. Prescott, the band leader, had attempted to get Ms. Franklin to drop the charges. After Mr. Foster and Mr. Thompson had begun their investigation, Dr. Prescott met with Ms. Franklin privately and told her (1) that it would be a big mess if she went through with the investigation, (2) that Mr. Hill's name would be in the newspapers and on the 6:00 p.m. news, (3) that the school would look bad, and (4) that she would look bad. Dr. Prescott stated that "no one would gain from reporting the incident." Dr. Prescott also attempted to persuade Ms. Franklin's boyfriend to speak to Ms. Franklin about dropping the charges because it was a "no win" situation.

During the course of the school's investigation, Dennis Foster, the investigator, advised Ms. Franklin's parents that he believed she was telling the truth. Mr. Foster's final memorandum to Jim Steele, dated April 1, 1988, made ten (10) points concerning the incident:

1. Christine Franklin, when questioned about birth control, did not know the word until Dr. Lewis stated it and she immediately said "that's the word." When Coach Andy Hill was questioned about it, he had the remarkable memory, of an incidental conversation that took place six months ago, to say that she had knowledge of it because one day out in the parking lot, while talking with Christine, she asked him why he was absent the previous day. Coach Andy Hill stated that he told her that he had had a male operation. Coach

Andy Hill stated that Christine immediately said "oh, you had a vasectomy." The girl didn't know the word when questioned by us.

2. Coach Andy Hill was told by Dr. Lewis, the first time we talked to him, to stay away from her. That same day, Coach Andy Hill approached Christine and told her to drop the case.
3. Coach Andy Hill told us, in the second conversation we had with him, that if he had sex with the girl, surely she would have noticed a surgical scar on the left side of his body. We never mentioned this to Christine [about the scar]. In her statement, she mentioned that she had noticed a scar on his abdomen.
4. Christine is determined, as are her parents, to take a polygraph. Coach Andy Hill is adamant to not take one. He even stated that his lawyer told him that it would be a good idea if the girl did not take one. To me, this is peculiar, for his lawyer to advise the girl not to take one.
5. The girl was very descriptive in describing the interior of the press box. She stated that she had never been in it before. We verified this with Dr. Prescott, that students were not allowed in the press box, while he was directing them on the field. He stated that it is highly unlikely that she could even get near the press box, because she was in the band, on the field.
6. Coach Andy Hill stated that he lied on a note that he gave another teacher to get Christine into class late, stating that she was helping him look for a football

jersey. He finally stated that he was "counseling" her.

7. All three of the girls that are making accusations against Coach Andy Hill are of weak character – possibly victimized because of their character and lack of credibility.

8. After being told by Dr. Owen to go and report to Dr. Lewis, about these allegations, Coach Andy Hill never did.

9. Coach Andy Hill's story of what happened between the confrontation between himself and Christine, and Doug Kreeft, differs from Doug's and Christine's story.

10. Coach Andy Hill called Christine, at her house, over the summer, and according to him, he called her back to check on band practice. Christine Franklin has an unlisted number and her version of the story differs from that of Coach Andy Hill. Opinion: Coach Andy Hill could have gotten the band practice schedule from Dr. Prescott.

On April 14, 1988, Mr. Hill tendered a handwritten letter resigning from Gwinnett County Public Schools.

REASONS FOR ALLOWANCE OF THE WRIT

I. INTRODUCTION – THERE IS A SPLIT OF AUTHORITY BETWEEN THE ELEVENTH CIRCUIT AND THE THIRD CIRCUIT AS TO WHETHER COMPENSATORY DAMAGES ARE AVAILABLE FOR INTENTIONAL DISCRIMINATION UNDER TITLE IX OF THE EDUCATION AMENDMENTS ACT.

Ms. Franklin contends that compensatory damages are allowed as a remedy for intentional discrimination under the Education Amendments of 1972. In support of this contention, Ms. Franklin argues that the Supreme

Court of the United States opinion in *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582 (1983), provides the basis for such compensatory damages.

While the Eleventh Circuit in *Franklin v. Gwinnett County Schools*, 911 F.2d 617 (11th Cir. 1990), held that *Guardians* had not expressly overruled the Fifth Circuit precedent of *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981), which held that Title IX relief is limited to cessation of discriminatory activity, it did recognize that *Guardians* provided no clear majority on the issue of whether compensatory relief is available under Title IX for acts of intentional discrimination. In fact, the Eleventh Circuit recognized that *Guardians* was a fragmented decision which left open the question of whether compensatory damages for intentional discrimination may be sought. Additionally, Judge Johnson noted in his concurrence that until the Supreme Court or an *en banc* court says otherwise, *Drayden* is the law of the Eleventh Circuit. *Franklin, supra.* at 623.

However, the Third Circuit Court of Appeals held that compensatory damages are available under Title IX for intentional acts of discrimination. *See, Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Center Area School District, et al.*, 1990 W.L. 163389 (3rd Cir. 1990).

For these reasons, the Petitioner asserts that the Eleventh Circuit Court of Appeals and the Third Circuit Court of Appeals are in direct conflict as to whether compensatory damages are available under Title IX for intentional discrimination and that the Supreme Court of the United States should settle the issue.

II. THE SUPREME COURT'S OPINION IN *GUARDIANS ASS'N v. CIVIL SERVICE COMMISSION* ESTABLISHES THAT VICTIMS OF INTENTIONAL DISCRIMINATION CAN RECOVER COMPENSATORY RELIEF UNDER TITLE IX OF THE EDUCATION AMENDMENTS OF 1972.

Ms. Franklin contends that victims of intentional discrimination can recover compensatory damages under

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.[1] Franklin's position is supported by Justice White's opinion in *Guardians Ass'n Civil Service Commission of the City of New York*, 463 U.S. 582 (1983),[2] the legislative history of Title IX, and the Third Circuit's decision in *Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Center Area School District, et al.*, 1990 W.L. 163389 (3rd Cir. 1990). *Pfeiffer* held that compensatory damages are available for intentional violations of Title IX. In the case at bar, the Eleventh Circuit held that *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir., Unit A, April 1981), was dispositive of the issue. In so holding, the Eleventh Circuit recognized that *Guardians* was a fragmented opinion where three (3) members of the court concluded that the issue of compensatory damages was open and four (4) justices believed relief was available. It is because of this split of authority that this Writ of Certiorari should be granted.

In *Guardians*, black and Hispanic policemen sued the City of New York, challenging entry level examinations for police officers. Although the District Court found no

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[1] Title IX provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . " 20 U.S.C. § 1871(a) (1988).

[2] The language of Title IX tracks that of Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252 (codified at 42 U.S.C. § 2000d to 2000d-7 (1982), as does the Rehabilitation Act, 29 U.S.C. § 794 (§ 504) and the Age Discrimination Act, 42 U.S.C. § 6101, *et seq. See, U.S. Dept. of Trans. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n. 4 (1986); *Cannon v. University of Chicago*, 441 U.S. 677, 694-696 (1979); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-631 (1984). Since Title IX is for the most part interchangeable with Title VI, Ms. Franklin will cite cases interchangeably in this petition. *See also, Franklin v. Gwinnett County Public Schools*, 911 F.2d 617 (1990) (the same analysis should apply to both statutes).

evidence of discriminatory intent, it did find the examinations had a discriminatory impact on black and Hispanic applicants. Based upon the finding, the court awarded the plaintiffs compensatory relief under Title VI. The United States Court of Appeals for the Second Circuit reversed the judgment of the District Court, holding that proof of discriminatory intent was a requirement of Title VI.

The Supreme Court affirmed that judgment of the Second Circuit, but for different reasons. Five (5) Justices of the Supreme Court held that proof of discriminatory intent was not a requirement for establishing a cause of action under Title VI, but that compensatory relief was unavailable for victims of unintentional discrimination. (*See, Guardians*, 463 U.S. at 606-07, 103 S.Ct. at 3234-35, (White, J., announcing judgment of the court, joined by Rehnquist, J.); *Id.* at 610-11, 103 S.Ct. at 3236-37 (Powell, J., concurring, joined by Burger, C. J., and Rehnquist, J.); *Id* at 615, 103 S.Ct. at 3239 (O'Conner, J., concurring). They based this conclusion on the general rule that remedies to enforce spending clause statutes must "respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has determined are necessary for compliance." *Guardians*, 463 U.S. at 597, *citing Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). *See also, Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d (1970).

Justice White, joined by five (5) other members of the Supreme Court, would reach a different result if the plaintiff proved intentional discrimination:

> Because it was found that there was no proof of intentional discrimination by respondents, I put aside for present purposes those situations involving a private plaintiff who is entitled to benefits of a federal program but has been intentionally discriminated against by the administrators of the program. In cases where

> intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as prospective relief in the event the State continues with the program.

Guardians, 463 U.S. 597.[3]

In the instant case, Respondent, in seeking dismissal of the action at the District Court level, attacked the decision in *Guardians* and cited former Fifth Circuit precedent in *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981), as authority for its argument that Title IX relief was limited to cessation of the discriminatory activity. Respondent also relied upon Seventh Circuit decisions in *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), and *Cannon v. University of Health Sciences*, 710 F.2d 351 (7th Cir. 1983).[4]

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[3] Several decisions have interpreted *Guardians* as authorizing compensatory damages for intentional violations of the affected statutes. *See, Pfeiffer, supra*, (3rd Circuit Court of Appeals. *See Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986); *Wilder v. City of New York*, 568 F. Supp. 1132, 1135 (E.D.N.Y. 1983); *Storey v. Board of Regents of Univ. of Wis. System*, 604 F. Supp. 1200, 1202 n. 3 (W.D. Wis. 1985); *Manecke v. School Bd. of Pinellas County*, 762 F.2d 912, 922 n. 8 (11th Cir. 1985); *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984); *Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Sabo v. O'Bannon*, 586 F. Supp. 1132, 1138 (E.D. Pa. 1984); *Araujo v. Trustees of Boston College*, 34 Empl. Prac. Dec. (CCH) ¶ 34,409 (D. Mass. Dec. 16, 1983); *Organization of Minority Vendors, Inc. v. Ill. Cent. Gulf R.R.*, 579 F. Supp. 574, 594-595, n. 10 (N.D. Ill. 1983).

[4] These particular cases will be collectively referred to as *Lieberman* to avoid confusion with *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

The District Court below relied upon *Drayden*, and stated that "[a]bsent some clear authority modifying or limiting *Drayden*, this court declines to enlarge on the existing remedies available under Title IX." *See*, Appendix B. The District Court and the Eleventh Circuit's conclusion that compensatory damages would be an expansion of existing remedies is inaccurate. *Guardians* did not involve intentional discrimination and in fact, the Eleventh Circuit has expressly left this issue open for the Supreme Court of the United States to decide. Ms. Franklin also shows this Court that the Seventh Circuit's opinion in *Lieberman* is no longer valid in view of new precedent. *See, Craft v. Board of Trustees of University of Illinois*, 793 F.2d 140 (7th Cir. 1986).

In *Drayden*, black female school teachers filed an action against their employer alleging violations of 42 U.S.C §§ 1981, 1985, and 1986. After the then-Department of Health, Education and Welfare determined that the school Board had not complied with Title VI of the Civil Rights Act of 1964, the teachers amended their complaint seeking damages, declaratory, and injunctive relief. The District Court dismissed the action and the former Fifth Circuit affirmed, stating that the only relief allowed under Title VI is cessation of the discriminatory activity.

Drayden has limited or no precedential value. Since 1981, when the opinion was issued, the Supreme Court has issued its opinions in *Guardians, supra*, and *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624 (1984), and the Eleventh Circuit Court of Appeals has understood the issue of damages to be an open question. *See, Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983); *Manecke v. School Bd. of Pinellas County*, 762 F.2d 912 (11th Cir. 1985); and *Franklin v. Gwinnett County Public Schools*, 911 F.2d 617, 621 (1990). More recently, the Third Circuit Court of Appeals issued its holding in *Pfeiffer, supra*.

In *Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Center Area School District, et al., supra,* the United States Court of Appeals for the Third Circuit, in ruling on an appeal from the United States District Court for the Western District of Pennsylvania, held that compensatory damages are available for intentional violations of Title IX. In this case, the court was faced squarely with the issue of whether compensatory damages are available under Title IX. However, in *Franklin, supra,* the Eleventh Circuit held that compensatory damages were unavailable.

The facts of *Pfeiffer* are noteworthy. Arlene Pfeiffer was a member of the Class of 1984 at Marion Center High School in Marion, Indiana County, Pennsylvania. She was a good student who earned high grades and participated in a wide variety of school organizations, including serving as President of the Student Council. Based on her record, she was elected to her high school's chapter of the National Honor Society ("NHS") in 1981. *Id.* This chapter was governed by a faculty council composed of Robert L. Stewart, the Principal of the high school, Thetta Lightcap, Jane Smith, Judith Scubis, and George Krivonick, all teachers of the Marion Center High School.

During the spring of 1983, Pfeiffer, who was unmarried, discovered that she was pregnant. She informed her school guidance counselor and principal and indicated that she wanted to rear her child but that she also wanted to finish high school. Principal Stewart informed her that he saw no problem in her plan to continue school and graduate. *Id.*

Upon learning of Pfeiffer's pregnancy, Judith Scubis, a teacher and member of the faculty council, brought the matter to the attention of the other council members of the NHS in the spring of 1983. *Id.* That fall, when school resumed, the council scheduled a meeting for November 4, 1983, which Pfeiffer was invited to attend. At this time, the council members explained to her that her NHS membership was in question because premarital sex appeared

to be contrary to the qualities of leadership and character essential for membership. *Id.*

On November 8, 1983, Pfeiffer's father, Delmont Pfeiffer, telephoned Principal Stewart requesting a prompt decision because an induction ceremony for seniors was scheduled for the next day and Arlene wanted to attend. *Id.* Council met in the morning of November 9, 1983, and by secret ballot unanimously voted to dismiss her from the NHS chapter. *Id.*

On November 30, 1983, the council met with Pfeiffer's parents, who requested that the subject be placed on the agenda of the School Board's meeting scheduled for December 12, 1983. Pfeiffer and her parents appeared at the meeting with council and at the discussion, the Board was asked to review the decision of the faculty council. On December 19, 1983, the Board and the council met to consider the matter further and on January 16, 1984, the School Board adopted a resolution unanimously confirming the action of the faculty council.

Pfeiffer filed suit alleging discrimination in her dismissal from the local chapter of the NHS seeking an injunction, that she be reinstated in the chapter, that the records of the school district be corrected to show that she remained in good standing in the Society, that a procedure for dismissal be ordered that is not discriminatory, that the NHS be prohibited from disseminating information about her dismissal, and that she be awarded compensatory and punitive damages. Injunctive relief and damages were requested under Title IX of the Education Amendments of 1972 and its implementing regulations. *Id.*

The Court of Appeals for the Third Circuit, after ruling that Title IX was applicable, held that compensatory damages are available under Title IX of the Education Amendments Act, a holding directly contrary to that

of the Court of Appeals for the Eleventh Circuit in *Franklin* upon which this petition is based. In holding that compensatory damages under Title IX were available, the court cited *Guardians Ass'n* for the proposition that a majority of the court found that compensatory relief based on past violations of conditions regulating use of Federal funds is available for Title VI violations when intentional discrimination is present. *Id.* Tracking the analysis in the five (5) opinions in *Guardians*, the court concluded "not without some difficulty, that compensatory relief is available for certain Title IX violations and that this [case] is one of them." Furthermore, the court recognized that

> [O]ur decision here puts us in conflict with the Courts of Appeals of both the Seventh and Eleventh Circuits. *See, Franklin v. Gwinnett County Public Schools*, 911 F.2d 617 (11th Cir. 1990) (compensatory damages are not recoverable under either Title VI or Title IX based on Fifth Circuit precedent); *Cannon v. University of Health Science/The Chicago Medical School*, 710 F.2d 351 (7th Cir. 1983) (case law precluded claim for damages under Title IX); *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981) (damages unavailable under Title IX), *cert. denied*, 456 U.S. 937 (1982). However, we believe that it is to the Supreme Court that we must look for guidance, and our reading of *Guardian Ass'n, supra*, and its prodigeny, persuades us that Title IX includes a remedy of compensatory damages. In so doing, we follow the analysis of Judge Lord in *Haffer v. Temple University*, 678 F. Supp. 517 (E.D. Pa. 1987), and Chief Judge Nealon in *Beehler v. Jeffes*, 664 F. Supp. 931 (M.D. Pa. 1986).

Id.

For each of the aforementioned reasons, especially the split of authority between the Eleventh Circuit and the Third Circuit, this petition for writ of certiorari should be granted.

III. A COMPENSATORY DAMAGES REMEDY IS NECESSARY TO ENFORCE FOURTEENTH AMENDMENT RIGHTS UNDER THE EDUCATION AMENDMENTS OF 1972

The Court of Appeals for the Eleventh Circuit relied for its determination that damages are not available under Title IX, in substantial part, on the view that Title IX is spending power legislation and private remedies, unless expressly provided by Congress, should be limited. *See, Franklin*, 911 F.2d at 621. Justice Harlan, in its concurring opinion in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1970), stated that "[I]n suits for damages based on violations of federal statutes lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the Congressional policy underpinning the substantive provisions of the statute." Therefore, the proper test is "whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the interest asserted." *Id.* at 407. The first step in such an inquiry then is to determine the nature of the interest asserted. Respondent would urge this Court that Title IX is simply "spending clause" legislation, and that Ms. Franklin has no interest to be vindicated. Petitioner, on the other hand, contends that Congress intended to protect important Fourteenth Amendment rights through the statute.

This Court has previously indicated that one of the purposes of the Education Amendments was to protect Fourteenth Amendment rights. In *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), the Court stated that the purpose of the statute was twofold: "[F]irst, to avoid the issue of federal resources to support discriminatory practices. The second purpose of the statute was to provide individual citizens effective protection against discrimination." *Id.* at 704. Petitioner adopts that portion of the amicus brief of the National Women's Law Center filed in the Eleventh Circuit (attached hereto as Appendix "D"),

which demonstrates that Title IX "unmistakably bears the imprint of the Fourteenth Amendment . . . . " *See* Brief of Amicus, page 17. Title IX is not simply "spending clause" legislation, as Respondent would argue.

If Congress did not utilize its power under the Fourteenth Amendment, then it surely would not have been necessary to specifically invoke Section 5 of the Amendment to abrogate the states' Eleventh Amendment immunity for violations of the statute. S. Rep. No. 388, 99th Cong. 2d Sess. 27 (1986). Similarly, Congress passed the Civil Rights Attorneys Fees Awards Act of 1976 specifically under the authority of the Fourteenth Amendment. S. Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5913. The Fourteenth Amendment connection is firmly established and a damages remedy is necessary to vindicate rights guaranteed by the Amendment.

In determining whether damages relief is necessary to protect interests under a statute, this Court should look to six factors. (1) the nature of the interest protected and the absence of contrary legislative intent; (2) the seriousness of the injury to the particular plaintiff; (3) the extent to which the harm threatens others similarly situated; (4) the extent to which workable standards of adjudication can be formulated; (5) the social interest in permitting the conduct complained of, and (6) the burden imposed by judicial intervention in similar cases in the future. *See, J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. Pa. L. Rev. 1 (1968).

In the first instance, the protections of the Fourteenth Amendment are clearly important rights which have been recognized by this Court on numerous occasions, particularly where the interests of children are concerned. *See, e.g., Taylor v. Ledbetter*, 812 F.2d 298 (11th Cir. 1987). The protections of the Fourteenth Amendment given to women in employment pursuant to Title VII of the Civil Rights Act of 1964 should not be less than the protection

given to women under the Education Amendments of 1972. If these protections were not afforded women in this instance, than a 15 or 16 year-old high school student would be entitled to less protection from invidious sexual discrimination, including sexual harassment, than a 30 year-old office worker, also victimized by sexual harassment.

The protections offered by Title IX should be greater than those offered by Title VII. A school board which accepts federal funds under Title IX voluntarily gives its assurance that it will not discriminate as a condition for receipt of those funds. A business subject to the proscriptions of Title VII makes no such agreement and receives no funds; the prohibitions of the statute are simply imposed upon it. The school board that thereafter engages in intentional discrimination is more culpable because it specifically gave its assurance that it would not do so.

Under the second criteria, Petitioner stands to suffer much harm from the discriminatory actions of Respondent. The Eleventh Circuit has extensively reviewed the problems of sexual harassment in employment. *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). The problems of sexual harassment in education are even greater. The teacher-student relationship is, in a sense, a fiduciary relationship involving trust and dependency not often found in the employment context. Schneider, *Sexual Harassment and Higher Education*, 65 U. Cin. L. Rev. 525, n.19 (1987). Moreover, the harms of sexual harassment are greater and the student more vulnerable to reprisals, such as lowered grades, denied recommendations, etc. In an employment context, it is easier to resign and supervisors, unlike teachers, do not enjoy the cloak of academic freedom.

Third, the problem of sexual discrimination, and particularly sexual harassment, is extensive, not only in colleges, but in secondary schools as well. *See, Stoneking v. Bradford Area School District*, No. 87-3637, slip op. (3d Cir.

Sept. 12, 1988). In *Stoneking*, a popular band leader, through physical force, threats of reprisals, intimidation and coercion, sexually abused and harassed various female band members. His conduct included forcing one female to engage in various sexual acts with him in diverse places, including the school. School administrators knew that the band leader had engaged in the sexual harassment of various females, but failed to take action.

A teacher at a Rockdale County, Georgia school, was convicted of charges that he fondled female students. Two disinterested females purportedly testified at his trial under oath, that they had reported this teacher's sexual abuse two years before he was accused to the school principal, who did nothing. A civil action entitled *McDonald, et al. v. Jenette, The Rockdale County School District and the Rockdale County Board of Education*, 1:89-CV-1049-ODE, has been brought under Title IX in the Northern District of Georgia. The rights of similarly-situated students need protection.

Fourth, there are workable standards of adjudication for damages in cases of sexual discrimination and harassment. In *Carey v. Pipus*, 435 U.S. 247 (1978), high school students filed an action seeking damages for being denied procedural due process rights after being suspended from school. The Court denied relief, stating that there must be evidence of an injury. In making that determination, the Court stated:

> We foresee no particular difficulty in producing evidence that mental and emotional distress was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.

Carey, 435 U.S. at 263. In a footnote, the Court added:

> We use the term 'distress' to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and

> observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury. (Citation omitted.)

Workable standards for proving an injury can be formulated, and already are in effect. Courts do so every day in Section 1983 actions. *See, e.g., Dykes v. Hoseman*, 743 F.2d 1488, 1500 (11th Cir. 1984); *Vanelli v. Reynolds School Dist. No. 7*, 667 F.2d 773 (9th Cir. 1982); *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981); *Jones v. City of Key West*, 679 F. Supp. 1547 (S.D. Fla. 1988).

The fifth criteria for determining whether a damages remedy is appropriate also militates in favor of the Petitioner's case. There is absolutely no social utility whatsoever in allowing the conduct that is the subject matter of the suit.

The sixth criteria is the burden of judicial intervention in similar cases. Respondent argued that "[P]laintiff's remedies are protected by state law," and "[M]onetary relief is available elsewhere." They contended, as a matter of policy, that educational institutions would be subject to liability. But, this is the policy issue already decided by Congress when they enacted the Civil Rights Remedies Equalization Amendment. S. Rep. No. 388, 99th Cong. 2d Sess. 27 (1986). The Senate Report, which is attached as an appendix to the Brief of the Amici in this case, clearly shows Congress evaluated this policy argument and rejected Respondent's position:

> Section 1003 also explicitly provides that in a suit against a State for a violation of any of these statute remedies, *including monetary damages*, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State.

Id. at 28 (emphasis added). It would be disingenuous for Respondent to argue that they would experience liability problems when Congress resolved that issue. If Respondent thinks that accepting responsibility for its actions

and complying with government rules against discrimination is too large a price to pay for federal assistance, then they can refuse the aid. As Justice White stated in *Guardians*, "[T]here can be no question as to what the recipient's obligation under the program was and no question [that] the recipient was aware of that obligation." 463 U.S. at 598.

In summary, all of the six criteria for determining whether compensatory relief should be granted fall squarely in favor of Petitioner and against Respondent. Evaluation of the six criteria conclusively answers the question of whether damages are necessary to effectuate the purposes of the statute in the affirmative. While the Eleventh Circuit ruled that they must proceed with extreme care when . . . asked to find a right to compensatory relief, where Congress has not expressly provided such a remedy, it is clear that damages are an appropriate remedy for an institution that gives its word to the United States government that it will not discriminate on the basis of gender and then does it anyway.[5] Therefore, this Court should grant this writ on this issue as well.

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[5] An investigation by the majority staff of the Committee on Education in Labor in the U.S. House of Representatives found that the agency has not vigorously enforced laws protecting the rights of women and minorities in Education. Staff of H.R. Comm. on Education and Labor, 100th Cong. 2d Sess., *Report on the Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, U.S. Dept. of Education*. (Comm. Print 1988). Indeed, the majority of complaint investigations were closed with findings of "no violation." With regard to investigations regarding handicap and gender discrimination, OCR (Office for Civil Rights, U.S. Department of Education) procedure seems to be to close the file with a finding of "violation corrected," which is precisely what happened in the instant case. This investigation revealed that OCR staff had, among other things, encouraged complaints to withdraw complaints to decrease work load and refrained from handling issues considered "off limits."

IV. CONCLUSION.

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

FRANKLIN v. GWINNETT COUNTY PUBLIC SCHOOLS

Christine FRANKLIN,
Plaintiff-Appellant,

v.

The GWINNETT COUNTY PUBLIC SCHOOLS, a Local Education Agency (LEA), Dr. William Prescott, An Individual,
Defendants-Appellees.

No. 89-8393.

United States Court of Appeals,
Eleventh Circuit.

Sept. 10, 1990.

Appeal from the United States District Court for the Northern District of Georgia.

Before JOHNSON, Circuit judge, HILL* and HENLEY**, Senior Circuit Judges.

HENLEY, Senior Circuit Judge.

Christine Franklin appeals from the district court's[1] dismissal of her action pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted.[2] We affirm.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

[1] The Honorable Orinda D. Evans, United States District Judge, Northern District of Georgia.

[2] In support of Franklin, the National Women's Law Center submitted a brief on behalf of numerous interested parties;

(Continued on following page)

Franklin brought the action under Title IX of the Education Amendments of 1972 (codified as amended at 20 U.S.C. §§ 1681-1688 (1988)) ("Title IX"), seeking damages against Gwinnett County Public Schools ("Gwinnett"), and Dr. William Prescott, contending that she had been intentionally discriminated against because of her gender. Gwinnett filed a motion to dismiss, arguing, *inter alia*, that compensatory relief is unavailable for violations of Title IX of the Education Amendments of 1972.

According to her complaint, Franklin attended North Gwinnett High School, Gwinnett County Public School District, in the State of Georgia. In September of 1986, Coach Andrew Hill, Franklin's economics teacher, became friends with her. Indications of this friendship included Franklin being allowed to grade class papers, private meetings between her and Hill during and between classes, notes written by Hill authorizing her late admittance to other classes, and private visits by her and Hill to Hill's office, which was separated from the main school building.

According to the complaint, during this period of time Hill initiated with Franklin discussions of a sexual nature. Dr. William Prescott, band director at the school, was told by Douglas Kreeft, Franklin's boyfriend, about these discussions. Franklin was excused from several classes at the request of Hill. At one point after an argument in the school parking lot, Hill grabbed Franklin and

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(Continued from previous page)

in support of Gwinnett, the Georgia School Boards Association and the Alabama Association of School Boards have submitted amicus briefs.

kissed her. In October of 1987, an assistant principal was told by other students of "involvement" between Hill and Franklin. The student was "admonished." During this period of time, certain female students indicated to teachers and a guidance counsellor [sic] at the school that Hill was directing sexual remarks at other female students as well.

Ultimately, according to the complaint, Hill and Franklin engaged in two or three episodes of sexual intercourse on school grounds between October and December of 1987. On February 29, 1988, the school's principal was informed of the alleged sexual activity between Hill and Franklin.

Franklin alleged that after she reported the above circumstances to school authorities Prescott tried to discourage her from pursuing the matter by talking to her about the negative publicity which could result. Prescott also spoke to Kreeft in an effort to enlist his assistance to discourage Franklin from pursuing the matter. Sometime between March 2 and March 14, 1988, Gwinnett began an investigation. At the termination of the 1987-88 school year, Hill resigned and Prescott retired. At this point, Gwinnett closed its investigation.

In August of 1988, Franklin filed a complaint against Gwinnett with the Office of Civil Rights ("OCR"), United States Department of Education, alleging that she had been subjected to sexual discrimination in violation of Title IX.[3] Following a six-month investigation, OCR found

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[3] The Department is charged with promulgating and enforcing regulations pursuant to Title IX. *See* 34 C.F.R. §§ 106.1-106.71 (1989).

Gwinnett in violation of Title IX.[4] However in a December 14, 1988 letter signed by its regional director and addressed to Franklin's counsel OCR stated that due to assurances of affirmative actions designed to prevent any future violations it considered Gwinnett as of that date in compliance with Title IX. Therefore, the OCR investigation was closed.

In the context of a motion to dismiss, we accept as true facts alleged in a complaint and construe them in a light favorable to the plaintiff. *E.G., Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp.*, 711 F.2d 989, 994-95 (11th Cir.1983). The parties agree and cases have held that Title VI of Civil Rights Act of 1964 (codified as amended at 42 U.S.C. §§ 2000d to d-4 (1988)) ("Title VI"),[5] served as the legislative antecedent for Title IX,[6] and that consequently, the jurisprudential analysis of

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[4] Specifically, Gwinnett was found in violation of 34 C.F.R. §§ 106.8, .31(a), .31(b)(2), .31(b)(4), .31(b)(7), .71 (1989).

[5] Section 601 of Title VI provides the following:

> No person in the United State shall, on the basis of race, color, or national origin, be excluded from participation in, be denied the benefits of, or by subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L.No. 88-352, tit. VI, § 601, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d (1988)).

[6] Section 901(a) of Title IX provides the following:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

(Continued on following page)

the Justices' opinions in *Guardians Association v. Civil Service Commission*, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983), which construed Title VI (and upon which both parties rely), as well as the analysis of other Title VI cases, is applicable in a Title IX context. *See Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).

> Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefitted class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

Id. at 694-96, 99 S.Ct. at 1956-57. Hereinafter we discuss Title VI and Title IX cases somewhat interchangeably, because we believe it is settled that analysis of the Two statutes is substantially the same.

For purposes of this case, it is undisputed that an implied private right of action exists under Title IX. *See Cannon*, 441 U.S. 677, 99 S.Ct. 1946. However, it is clear that the question "whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."

(Continued from previous page)

> under any education program or activity receiving Federal financial assistance.

Pub.L.No. 92-318, § 901(a), 86 Stat. 373 (1972) (codified at 20 U.S.C. § 1681(a)(1988)).

Davis v. Passman, 442 U.S. 228, 239, 99 S.Ct. 2264, 2274, 60 L.Ed.2d 846 (1979). Consequently, the existence of a cause of action by no means assures a right to an unlimited array of remedies.

In *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir.Unit A April 1981), discharged black teachers filed suit under Title VI and other civil rights statutes alleging civil rights violations against a school district for which they had worked, seeking declaratory and injunctive relief and damages. In affirming the dismissal of the action, the court held that the "private right of action allowed under Title VI encompasses *no more* than an attempt to have any discriminatory activity ceased." *Id* at 133 (emphasis added); *see also Lieberman v. University of Chicago*, 660 F.2d 1185, 1188 (7th Cir.1981) (affirming summary judgment against plaintiff who sought damages under Title IX for discriminatory medical school admissions policies, noting that it is for Congress, not the courts, to create a right to damages), *cert. denied*, 463 U.S. 602, 102 S.Ct. 1993, 72 L.Ed.2d 456 (1982).

Since decisions of the former Fifth Circuit rendered prior to October 1, 1981 represent binding precedent for this court, *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir.1981) (en banc), we find it clear that *Drayden* constituted this circuit's view on the matter of compensatory damages under Titles VI and IX prior to *Guardians Association*, a case to which we now turn.

In *Guardians Association*, petitioners black and Hispanic police officers of the City of New York, brought a class action lawsuit against the Civil Service Commission alleging their layoffs constituted civil rights violations

under, *inter alia*, Title VI. The district court awarded constructive seniority, with monetary and nonmonetary entitlements, and certain other relief. The court of appeals reversed on the issue of damages, holding that intentional discrimination – which had not been found by the trial court – was required for relief under Title VI.

A fragmented Supreme Court affirmed the judgment of the court of appeals. A fair reading of the various opinions discloses that a majority of Justices agreed that discriminatory intent is not a prerequisite to relief under Title VI, *see Guardians Association*, 463 U.S. at 584 & n. 2, 103 S.Ct. at 3223 & n. 2 (opinion of White, J.), but that "at least five justices would not allow *compensatory* relief to a private plaintiff under Title VI absent proof of discriminatory intent." *Manecke v. School Bd. of Pinellas County, Fla.*, 762 F.2d 912, 922, n. 8 (11th Cir.1985), *cert. denied*, 474 U.S. 1062, 106 S.Ct. 809, 88 L.Ed.2d 784 (1986).

At the outset, we concede some difficulty in application of *Guardians Association* to the instant dispute, given the various opinions therein. In this regard, we note the comments of Justice Powell that the Court's several "opinions [in *Guardians Association*] . . . will further confuse rather than guide." 463 U.S. at 608, 103 S.Ct. at 3235. And though *Guardians Association* has been described as "a badly fragmented decision," *see id.*, we nevertheless have looked to if for guidance.

In announcing the judgment of the *Guardians Association Court*, Justice White concocted an opinion which only Justice Rehnquist joined. Noting that there had been no showing of intentional discrimination, Justice White "put

aside" the question of damages in hypothetical circumstances involving intentional discrimination. 463 U.S. at 597, 103 S.Ct. at 3229. Justice White added, however, that "it *may* be that the victim of the intentional discrimination should be entitled to a compensatory award. . . . " *Id.* (emphasis added).

Justice Powell, joined by Chief Justice Burger, found no implied cause of action *at all* under Title VI. *See id.* at 608-11, 103 S.Ct. at 3235-37 (Powell, J., concurring in judgment). It follows logically that the Justices did not believe damages could be sought, where no cause of action could lie in the first place. Finally, Justice O'Connor also concurred in judgment, concluding that no relief of any kind was available without intentional discrimination. She therefore did not reach the issue of whether a private cause of action for damages would lie. *See id.* at 612 n. 1, 103 S.Ct. at 3238 n. 1 (O'Connor, J., concurring in judgment).

In dissent, Justice Marshall took the position that compensatory relief is available to a private Title VI plaintiff without a showing of intent to discriminate. *See id.* at 624-34, 103 S.Ct. at 3244-49 (Marshall, J., dissenting). Justice Stevens in dissent, with Justices Brennan and Blackmun joining, also determined that compensatory damages were available. *Id.* at 635-39, 103 S.Ct. at 3250-52 (Stevens, J., dissenting).

As we read this case, five members of the Court, White, Rehnquist, Powell, Burger and O'Connor, concluded that either the question of compensatory relief for intentional discrimination under Title VI was open (White, Rehnquist, O'Connor), or no private cause of

action under Title VI exists at all (Powell, Burger). In contrast, only four Justices, Marshall, Stevens, Brennan, and Blackmun, believed such relief was available.

Both Franklin and Gwinnett argue, at various points in the briefs, that *Guardians Association* is dispositive of the issue before us. Franklin, on the one hand, argues that the analysis of *Guardians Association* implicitly overruled *Drayden*, while Gwinnett on the other disagrees. We think Franklin reads too much into *Guardians Association*.

Although it seems clear that the judgment of *Guardians Association* precludes a cause of action for compensatory damages for *unintentional* discrimination, we believe the various opinions of a majority of the Justices simply leaves *open* the question whether compensatory damages for intentional discrimination may be sought. We do not read *Guardians Association* to hold that because no damages may be sought for unintentional discrimination, this necessarily leads to the inevitable conclusion that where *intentional* discrimination is shown, a damages remedy is possible. The question is simply open, and thus the inferior courts are free, checked only by the constraints within their respective spheres of authority, to act as they deem appropriate.

Justice White's opinion in *Guardians Association* provides other important guidance which assists in resolving the case before us. Justice White analyzed the nature of Title VI itself, viz, a statute enacted pursuant to the Spending Clause, *see* 463 U.S. at 598, 103 S.Ct. at 3230 (opinion of White, J.), as well as the "limited remed[ies]" which may flow from such legislation, *see id*, at 599, 103 S.Ct. at 3231. Under such statutes, relief may frequently

be limited to that which is equitable in nature, with the recipient of federal funds thus retaining the option of terminating such receipt in order to rid itself of an injunction. *See id.* at 596, 103 S.Ct. at 3229. Moreover, with such statutes the Supreme Court has not required a defendant to "provide money to plaintiffs, much less required [a defendant] to take on . . . open-ended and potentially burdensome obligations. . . . " *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 29, 101 S.Ct. 1531, 1546, 67 L.Ed.2d 694 (1981). Finally, "[s]ince the private cause of action . . . is one implied by the judiciary rather than expressly created by Congress, we should respect the . . . considerations applica' 'e in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder." *Guardians Ass'n*, 463 U.S. at 597, 103 S.Ct. at 3230.

Franklin argues, as does the National Women's Law Center, that the Civil Rights Remedies Equalization Amendment (codified at 42 U.S.C. § 2000d-7 (1988)), enacted in 1986, demonstrates that Title VI was passed pursuant to both the fourteenth amendment and the Spending Clause. This being true, a more liberal view of the damages question is in order, they contend. We disagree. The language of the statute, as far as we can tell, has no direct bearing on the question whether a cause of action for money damages will lie. Instead, the language only eliminates the sovereign immunity of States under the eleventh amendment in response to *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985).[7] The legislation makes clear that States may

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[7] The Civil Rights Remedies Equalization Amendment provides the following:

(Continued on following page)

now be sued under Title IX and other named statutes to the same extent that other entities may be sued under the statutes. But it does not directly address the question whether money damages can be had under the Title IX, nor does it suddenly change the original authority under which Congress passed the legislation, from that of the Spending Clause, to the fourteenth amendment.

Title IX, like Title VI, is Spending Clause legislation. Therefore, we proceed with extreme care when we are asked to find a right to compensatory relief, where Congress has not expressly provided such a remedy as a part of the statutory scheme, where the Supreme Court has not spoken clearly, and where binding precedent in this circuit is contrary.

(Continued from previous page)

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 [42 U.S.C.A. § 6106 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7 (1986).

We do not believe we are constrained by *Guardians Association* on the issue of compensatory damages for intentional discrimination. Nevertheless, we do remain bound to apply the law of this circuit, which includes precedent of the Fifth Circuit handed down prior to the formation of this circuit. *See Bonner*, 661 F.2d at 1207. Because we conclude above that the Supreme Court has not overruled *Drayden* either explicitly or implicitly, we are bound to follow *Drayden's* mandate that damages are unavailable under Title VI and IX.

Finally, we note that Franklin has invited this court to apply a Title VII[8] analysis to this case. Title VI and IX, as well as Title VII, all have an antidiscrimination purpose. But while Title VI and IX speak in terms of conditional grants which may be terminated if discrimination occurs under any federally funded program, Title VII (which we find unnecessary to extensively analyze for these purposes) speaks in terms of outright prohibitions, making discrimination in an employment setting an unlawful employment practice. *See, e.g.* 42 U.S.C. § 2000e-2. We do not believe applying Title VII to Title IX would result in the kind of orderly analysis so necessary in this confusing area of the law. For this reason, we decline to do so.

With regard to the question of the liability of Dr. William Prescott as an individual, insofar as we can tell, Franklin has abandoned this issue on appeal. There is no substantive discussion of the issue in her briefs, and the issue was not touched on by counsel at oral argument.

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[8] 42 U.S.C. §§ 2000e to e-17 (1988).

For these reasons, we do not find it necessary to consider the issue.[9]

For the reasons set out above, we AFFIRM the decision of the district court.[10]

JOHNSON, Circuit Judge, concurring specially:

Guardians Association is indeed a fragmented opinion. In divining a rule of law from it to address the situation now before this Court, we must consider the holding of the case to be the " 'position taken by those Members who concurred in the judgments on the narrowest grounds.' " *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993, 51 L.Ed.2d 260 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169, 96 S.Ct. 2909, 2923, 49 L.Ed.2d 859 n. 15 (1976)). *See also Martin v. Dugger*, 891 F.2d 807, 809 n. 2 (11th Cir.1989). In reaching the result in *Guardians Association*, five Members of the Court concluded that the appellants could not be awarded compensatory relief without a showing of intentional discrimination. *See Guardians Association*, 463 U.S. at 606-07, 103 S.Ct. at 3234-35 (White, J., announcing judgment of the Court, joined by Rehnquist, J.); *id.* at 610-11, 103 S.Ct. at 3236-37

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[9] We do, however, note that the Sixth Circuit has found there is no right to proceed against an individual under Title IX. *See, e.g., Leake v. University of Cincinnati*, 605 F.2d 255, 259-60 (6th Cir.1979).

[10] We do not here reach the question of any legal rights which Franklin may or may not have under either (1) state law or (2) any federal statute other than Title VI or IX. Any question in this regard must be considered on its own merits and in another setting.

(Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.); *id.* at 615, 103 S.Ct. at 3239 (O'Connor, J., concurring). This was the narrowest conclusion resulting in judgment and is therefore the rule to be drawn from the case. The many other suggestions made by the various concurrences and dissents regarding the kinds of remedies available under Title VI and the proof needed to achieve those remedies must be considered dicta. The opinions of Justices White and O'Connor specifically put aside the question of whether under Title VI damages may be awarded those suffering intentional discrimination. The opinions of Justices Marshall and Stevens indicate their preference to award compensatory relief to victims of discrimination under Title VI whether or not those victims can show purposeful discrimination, but their statements do not constitute an intervening rule of law which overrules the precedent of our Circuit. Until the Supreme Court or an en banc court of our own Circuit says otherwise, *Drayden* is binding precedent and we must follow it. *United States v. Machado*, 804 F.2d 1537, 1543 (11th Cir.1986) (stating that "[o]nly a decision by this court sitting en banc or the United States Supreme Court can overrule a prior panel decision").

I concur specially because I believe that *Drayden* alone is dispositive of this case. It is not necessary therefore to address the issues of whether Title VI and IX are grounded solely in the Spending Clause or whether Title VII analysis should apply to an action under Title VI or Title IX.

APPENDIX B

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CHRISTINE FRANKLIN	:	
	:	CIVIL NO. 1:88-
vs.	:	cv-2929-ODE
THE GWINNETT PUBLIC SCHOOLS and DR. WILLIAM PRESCOTT	:	

ORDER

(Filed May 1, 1989)

This Title IX action is before the court on Defendants' motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) and Plaintiff's motion for oral argument on Defendant's motion.

This claim arose in the autumn of 1986 when non-party Andrew Hill[1], a former teacher and coach at North Gwinnett High School, allegedly subjected Plaintiff, a female student, to sexual harassment including sexual intercourse. Her complaint alleges that the coach made intimate remarks to two other students who reported this to various school personnel; it also states that one of the students told an administrator that the coach had propositioned Plaintiff. Exhibit A[2] to the amended complaint indicates that once Plaintiff reported the physical harassment on February 22, 1988, district officials took action to

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[1] Plaintiff is purportedly pursuing separate causes of action against Mr. Hill in a Georgia Superior Court.

[2] This is a letter from the Office of Civil Rights to Plaintiff's attorney reporting on the findings and disposition of its investigation.

investigate the allegations and advised the coach to avoid Plaintiff. Plaintiff's complaint reveals that the investigation began sometime between March 2 and March 14, 1988.

Plaintiff claims Defendants' actions constitute violations of Title IX. She alleges that Defendant Prescott, formerly a band director at the school, attempted to intimidate her into dropping charges against the coach which she filed with the school district. She also contends that Defendant Gwinnett County Schools created a discriminatory, hostile and abusive environment in that it had actual knowledge of the coach's activities and intentionally failed to take action against him.

The Office of Civil Rights for the United States Department of Education investigated the allegations of Title IX violations in the fall of 1988. After interviewing Plaintiff and her attorney, school officials and teachers, it determined that the school district violated Title IX by failing to provide appropriate grievance procedures for students' complaints or sexual harassment. It also found that Plaintiff was deprived of her right to an education in a nondiscriminatory environment and that the coach and Defendant Prescott interfered with her right to complain about violations of Title IX. After concluding that the school district had implemented procedures to correct the violations, the Office of Civil Rights closed the investigation on December 14, 1988.

Defendants move to dismiss for failure to state a claim on which relief can be granted. Defendants argue that Plaintiff's claim is moot because the coach resigned and the school implemented the procedures required to

comply with Title IX before Plaintiff filed suit; thus, there is no longer an atmosphere of harassment or intimidation at the school. Defendants also maintain that because Title IX claims are only properly brought against institutions, the claim against Dr. Prescott must be dismissed. As well, Defendants contend that only injunctive relief, not the damages Plaintiff seeks, is available as a remedy under Title IX.

In response, Plaintiff argues that the only real issue before the court is whether compensatory relief is available under Title IX. Plaintiff contends money damages are available under Title IX for intentional acts of discrimination, citing *Guardians Assn. v. Civil Service Commission*, a Title VI case, as authority. *Id.*, 463 U.S. 582 (1983). Plaintiff asserts that the school's lack of proper grievance procedures constitutes intentional discrimination. Plaintiff contends her theory of recovery is grounded in both tort and contract, in that when the school district accepted federal funds, it contracted to comply with Title IX and it could have reasonably foreseen the circumstances under which it would violate that contract.

Plaintiff also asks the court to apply a Title VII analysis in establishing a prima facie case of sexual harassment. She argues that sexual advances toward a student are unwelcome per se. Plaintiff claims that under *Meritor Savings Bank v. Vinson*, the school is liable using both agency principles, as the coach was acting within the scope of his employment, and under a respondeat superior theory, because it failed to take remedial action. *Id.*, 477 U.S. 57 (1986).

As to her claim against Dr. Prescott, Plaintiff argues that she is an intended third party beneficiary under the school's contract with the federal government. Consequently, she contends her claim against him is based on tortious interference with contract.

The purpose of Title IX and the other statutes enacted under Congress' spending power is to ensure that the taxpayers' money is not spent in ways that discriminate.[3] *See Guardians*, 463 U.S. at 609 (Powell, J., concurring). Such legislation is analogous to a contract; "in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

Federal agencies may enforce compliance by withdrawing federal funds. *See, e.g.*, 20 U.S.C. §1682. In addition, courts recognize a private right of action under Title IX for injunctive relief to compel compliance. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). However, no authority binding on this court endorses compensatory damages to individuals suing under Title IX.

In fact, this court is bound by precedent to the contrary. *Drayden v. Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981). In *Drayden*, a case decided before the creation of the Eleventh Circuit, the Court stated that

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[3] Title IX, 20 U.S.C. §1681(a) states:

> No person in the United States shall, on the basis of sex, be excluded for participation in, be denied the benefits, of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

the "private right of action allowed under Title VI[4] encompasses no more than an attempt to have any discriminatory activity ceased." *Id.* at 133. The Office of Civil Rights reported that the school had corrected the violations of Title IX and was being monitored to assure continued compliance. Thus, it appears that the relief to which Plaintiff is entitled under Title IX has been obtained and her claim against the school is moot.

Absent some clear authority modifying or limiting *Drayden*, this court declines to enlarge on the existing remedies available under Title IX.[5] *Accord Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982); *Nabke v. H.U.D.*, 520 F. Supp. 5

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[4] The parties agree that the interpretation and application of Title VI and Title IX are analogous. *See Cannon*, 441 U.S. at 677.

[5] Despite Plaintiff's argument to the contrary, *Guardians* does not clearly authorize the relief she seeks, monetary damages for allegedly intentional discrimination. *See id.*, 463 U.S. at 608 (Powell, J., concurring in the judgment) ("Our opinions today will further confuse rather than guide."). In *Guardians*, Justice Rehnquist joined in Justice White's opinion which found that compensatory damages were not available for unintentional discrimination. *Id.*, 463 U.S. at 603. The opinion "puts aside" a ruling on cases of intentional discrimination, but in dicta notes that it is not uncommon for the extent of a defendant's liability to turn on the extent of culpability. *Id.* at 597 and n. 20. Justice Powell and Chief Justice Burger believed no private relief should be granted under any circumstances. *Id.* at 607 n. 27. Justice O'Connor did not reach the issue. *Id.* at 612 n. 1. In their respective dissents Justice Marshall and Justices Stevens, Brennan and Blackmun indicated that they thought money damages were within the purview of Title VI. *Id.* at 615 (Marshall, J., dissenting) and 635-635 (Stevens, J., dissenting).

(W.D. Mich. 1981); *but cf. Paisey v. Vitale*, 634 F. Supp. 741 (S.D. Fla. 1986), *aff'd on other grounds*, 807 F.2d 889 (11th Cir. 1986) (suggesting money damages may be appropriate for intentional violations of Title IX). Inasmuch as Plaintiff claims that the only real issue in this case is whether money damages are available under Title XI, she fails to state a claim upon which the relief she seeks can be granted by this court.

As to the Plaintiff's claim against Defendant Prescott, as stated above, Title IX is directed toward recipients of federal funds. 20 U.S.C. §1682. Plaintiff has not alleged that Defendant Prescott is such a recipient. Moreover, Title IX provides no basis for money damages on a claim for tortious interference with contract against an individual. In fact, Plaintiff has provided no authority for the contention that Title IX would support any claim against an individual. Consequently, Plaintiff fails to state a federal claim and thus this court lacks subject matter jurisdiction due to the absence of diversity between the parties.

Accordingly, Defendants' Motion to dismiss for failure to state a claim is hereby GRANTED. In light of this decision, Plaintiff's motion for oral argument is DENIED.

SO ORDERED, this 1 day of May, 1989.

/s/ Orinda D. Evans
ORINDA D. EVANS
UNITED STATES DISTRICT
JUDGE

ENTERED ON DOCKET
MAY 5 1989
L.D.T. CLERK
BY DEPUTY CLERK

ATTEST: A TRUE COPY
CERTIFIED THIS
DEC 04 1990
Luther D. Thomas, Clerk
By: /s/ B Jackson
Deputy Clerk

(SEAL)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8393

D.C. Docket No. 1:88-cv-2922-ODE

CHRISTINE FRANKLIN,

Plaintiff-Appellant,

versus

THE GWINNETT COUNTY PUBLIC SCHOOLS, a Local Education Agency (LEA), DR. WILLIAM PRESCOTT, An Individual,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before JOHNSON, Circuit Judge, HILL* and HENLEY**, Senior Circuit Judge.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that the plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

JOHNSON, Circuit Judge, concurred specially.

Entered: September 10, 1990
For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

A True Copy
Attested:

Clerk, U.S. Court of Appeals,
Eleventh Circuit
By: /s/ Keith Daniels
Deputy Clerk

ISSUED AS MANDATE: OCT 05 1990

(SEAL)

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-8393

CHRISTINE FRANKLIN,

Appellant,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a local education agency (LEA),
DR. WILLIAM PRESCOTT, an individual,

Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA,
ATLANTA DIVISION

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AMERICANS FOR DEMOCRATIC ACTION, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, DISPLACED HOMEMAKERS NETWORK, MENTAL HEALTH LAW PROJECT, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, NATIONAL ASSOCIATION FOR GIRLS AND WOMEN IN SPORT, NATIONAL ORGANIZATION FOR WOMEN, INC., NOW LEGAL DEFENSE AND EDUCATION FUND, OLDER WOMEN'S LEAGUE, WOMEN EMPLOYED, WOMEN'S EQUITY ACTION LEAGUE, AND WOMEN'S LAW PROJECT

Ellen J. Vargyas
Marcia D. Greenberger
National Women's Law Center
1616 P Street, N.W.
Washington, D.C. 20036
(202) 328-5160

Counsel for *Amici Curiae*

Dated: July 7, 1989

CERTIFICATE OF INTERESTED PERSONS

In conformance with 11th Cir. R. 28-2(b), the undersigned counsel for *amici curiae* National Women's Law Center *et al.* certifies:

1. The trial judge in this case was the Honorable Orinda D. Evans.

2. Ellen J. Vargyas and Marcia D. Greenberger of the National Women's Law Center are counsel for *amici curiae*. Appellant is represented by Stephen M. Katz of the law firm of Weinstock & Scavo, P.C. and appellee is represented by Frank C. Bedinger, III of the law firm of Freeman & Hawkins. To the knowledge of counsel for *amici curiae*, other attorneys interested in the outcome of this particular case include Victoria Sweeney of the law firm of Tennant, Davidson, Thompson & Sweeney; Arnold Wright, Jr.; Philip L. Hartley of the law firm of Harben & Hartley; Walter Britt of the law firm of Pruitt & Britt; and E. Freeman Leverett, Esq. of the law firm of Heard, Leverett & Phelps, P.C. Except for the parties *amici curiae*, listed below counsel for *amici curiae* are not aware of other attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this particular case.

3. *Amici curiae* include: The National Women's Law Center, American Association of University Women, American Civil Liberties Union, American Civil Liberties Union of Georgia, Americans For Democratic Action, Center for Women Policy Studies, Coalition of Labor Union Women, Disability Rights Education and Defense Fund, Displaced Homemakers Network, Mental Health Law Project, Mexican American Legal Defense and Educational Fund, National Association for Girls and Women in Sport, National Organization for Women, Inc., NOW Legal Defense and Education Fund, Older Women's League, Women Employed, Women's Equity Action League, and Women's Law Project.

These representations are made in order that judges of this Court, *inter alia*, may evaluate possible disqualification or recusal.

Respectfully submitted,

/s/ Marcia D. Greenberger
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Counsel for *Amici Curiae*

Dated: July 7, 1989

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*Authority upon which *amici curiae* primarily rely.

STATEMENT OF JURISDICTION AND STANDARD OF REVIEW

The jurisdiction of this Court rests on 28 U.S.C. § 1291. The issue addressed in this brief *amici curiae* presents a pure question of law, as to which this Court's review is *de novo*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-8393

CHRISTINE FRANKLIN,

Appellant,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a local education agency (LEA),
DR. WILLIAM PRESCOTT, an individual,

Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF GEORGIA, ATLANTA DIVISION

BRIEF OF *AMICI CURIAE*

INTEREST OF AMICI CURIAE

Amici curiae include civil rights, advocacy, labor, and educational organizations dedicated to the elimination of

discrimination in our society.[1] *Amici* believe that this case will have important ramifications for the ability of victims of discrimination by federally-assisted programs and activities to vindicate their basic rights. In particular, a decision that compensatory damages are not available pursuant to Title IX of the Education Amendments of 1972 will seriously undermine Congress' historic and consistent intent that all such victims of discrimination have an effective remedy for the wrongs they have suffered. In addition, it will subvert the clear weight of judicial authority that monetary damages are available for intentional violations of Title IX.

STATEMENT OF THE ISSUE PRESENTED

Are monetary damages available in actions brought pursuant to Title IX of the Education Amendments of 1972?

STATEMENT OF THE CASE

Amici Curiae adopt the statement of the case set forth in the brief of plaintiff-appellant, Christine Franklin.

SUMMARY OF THE ARGUMENT

Contrary to the conclusion of the court below, monetary damages are available in actions brought pursuant to Title IX of the Education Amendments of 1972.

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[1] The interest of each individual amicus curiae is set forth in the Appendix to this Brief.

1. In *Guardians Ass'n v. Civil Service Comm'n*, a majority of the Supreme Court held that monetary damages are available for intentional violations of Title VI of the Civil Rights Act of 1964. The clear majority of courts interpreting *Guardians* concur with this reading. Because Title IX was expressly modeled on Title VI and its framers intended that it be applied in the same fashion, this holding applies equally here.

2. Title IX is based, at least in part, on Congress' authority to enforce the fourteenth amendment. Consequently, limitations on inferring remedies in legislation enacted pursuant to the spending power do not apply. A damages remedy is appropriately construed because Title IX's history and interpretation, as evidenced, *inter alia*, by the Supreme Court's analysis in *Cannon v. University of Chicago*, as well as the enactment of the Civil Rights Attorneys Fees Awards Act of 1976 and the Civil Rights Remedies Equalization Act Amendment of 1986, clearly demonstrate that Congress intended to create individually enforceable rights secured by meaningful remedies including monetary damages.

3. Even if this Court finds that Title IX is spending power legislation, intentional discrimination is an exception to the general rule that individual monetary damages may not be implied.

ARGUMENT

I. INTRODUCTION

Squarely before this Court is the important question of whether damages are available in actions brought

pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. ("Title IX").[2] This case arises out of particularly egregious allegations by the plaintiff-appellant, Christine Franklin ("Ms. Franklin"), of sexual harassment.[3] Ms. Franklin, a high school student, has explicitly alleged that the discrimination she has suffered was intentional in nature and she seeks monetary compensation for her injuries.[4]

The court below dismissed Ms. Franklin's complaint on the grounds that Title IX does not state a claim for damages:

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[2] Title IX prohibits sex discrimination in federally funded education programs and activities. It provides, in pertinent part:

> No person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

[3] Sexual harassment clearly constitutes a violation of Title IX. *See. e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Moire v. Temple University School of Medicine*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986). Indeed, in the instant case, the Department of Education's Office for Civil Rights, which is charged with the administrative enforcement of Title IX, determined that the defendant school district had violated Title IX based on its deprivation of Ms. Franklin's "right to an education in a nondiscriminatory environment." *Slip op.* at 2.

[4] Because the procedural posture of this case is that of a motion to dismiss, all allegations must be accepted as true and be liberally construed so as to do "substantial justice." *Conley v. Gibson*, 355 U.S. 41, 45-46, 48 (1957).

> Inasmuch as Plaintiff claims that the only real issue in this case is whether money damages are available under Title IX she fails to state a claim upon which the relief she seeks can be granted by this court.

Slip op. at 6. In reaching this conclusion, the court explicitly declined to apply the Supreme Court's decision in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), *slip op.* at 5 n.5, which addressed the question of damages under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), and which is fully applicable, as well, to Title IX.[5] Instead, the court relied on pre-*Guardians* precedent for the proposition that no damages remedy is available. The court further held that Title IX was enacted pursuant to Congress' spending power authority and invoked the doctrine of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), apparently for the proposition that an individual damages remedy is, accordingly, inappropriate. *Slip op.* at 4.

Amici submit that the court below erred in dismissing Ms. Franklin's complaint on the basis that she is not entitled to monetary relief under Title IX. The proper

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[5] Title IX was expressly modeled on Title VI as were Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504") and the Age Discrimination Act, 42 U.S.C. §§ 6101 *et seq.* The same reasoning and legal doctrine apply in construing issues common to the four statutes. *See, e.g., United States Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n.4 (1986); *Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979). These include the availability of damages. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630-631 (1984).

interpretation of *Guardians* – supported by the overwhelming weight of authority – is that damages are available for intentional violations of Title IX. Further, contrary to the suggestion of the court below through its reference to *Pennhurst*, there is no constitutional impediment to the award of such relief. Indeed, the legislative record demonstrates that Congress intended that Title IX create individually enforceable rights secured by monetary damages. The decision below should be reversed and the case remanded for further proceedings to reach the merits of Ms. Franklin's claim.

II. GUARDIANS ESTABLISHES THE AVAILABILITY OF MONETARY DAMAGES FOR THE INTENTIONAL VIOLATION OF TITLE IX

A. MONETARY DAMAGES ARE AVAILABLE UNDER TITLE IX

The Supreme Court's decision in *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983), firmly establishes the availability of monetary relief for intentional violations of Title IX.[6] Plaintiffs in *Guardians*, black and hispanic police officers, had challenged the police department's entrance examinations as having a discriminatory

[6] This holding is fully consistent with well-established jurisprudence that federal courts will adjust their remedies as necessary to protect federally created rights and they may use any available remedy to rectify violations of such rights. *See Bell v. Hood*, 327 U.S. 678, 684 (1946). Indeed, the very existence of a statutory right implies the existence of all necessary and appropriate remedies. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).

impact on the basis of race and national origin in violation of, *inter alia*, Title VI. The Supreme Court reversed the lower court's decision requiring proof of discriminatory intent to make out the plaintiffs' claim. *Id.* at 584. While five separate opinions were filed in connection with the case, a majority of the Court held that compensatory damages are available for intentional violations of Title VI; the remainder of the Court simply did not reach the issue.

Justice White, writing for the Court in an opinion joined by then-Justice Rehnquist, held that private Title VI plaintiffs cannot recover compensatory damages unless they can show discriminatory intent. *Guardians*, 463 U.S. at 584; *see also id.* at 597, 607 n.27.[7] In addition, the four dissenting Justices supported the availability of compensatory damages under Title VI without reference to intent. *See* 463 U.S. at 615 (Marshall, J., dissenting); 463 U.S. at 635-40 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). Thus, six Justices would allow, at least, compensatory damages for intentional violations of Title VI.[8]

[7] Justice White relied on *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), to limit the relief available for unintentional violations of Title VI, *see id.* at 596, and then explicitly excepted cases of intentional discrimination from this restriction, *see id.* at 597. See discussion, *infra*, regarding the impact of *Pennhurst* on the availability of damages.

[8] Justice Powell, joined by Chief Justice Burger, concurred on the grounds that no private right of action exists under Title VI and that Title VI only prohibits intentional discrimination, *see Guardians*, 463 U.S. at 608-10, and thus did not reach the

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The clear majority of courts interpreting *Guardians* concur with this construction. For example, in the Title VI context, in *Craft v. Board of Trustees of the Univ. of Ill.*, 793 F.2d 140, 142 (7th Cir.), *cert. denied*, 497 U.S. 829 (1986), the Seventh Circuit relied on *Guardians* to approve the district judge's instruction to the jury that plaintiffs had to show discriminatory intent in order to recover compensatory relief for their alleged dismissal from an educational program in violation of Title VI. In so holding it observed, "the current position of the Court is that the granting of compensatory relief under § 2000d requires proof of discriminatory intent." *Id.* In *Singh v. Superintending School Comm. of Portland*, 601 F. Supp. 865 (D. Maine 1985), the court relied on *Guardians* to affirm the magistrate's decision not to strike the plaintiff's claim for damages for intentional employment discrimination in violation of Title VI. And the district court in *Paisey v. Vitale*, 634 F. Supp. 741 (S.D. Fla.), *aff'd on other grounds*, 807 F.2d 889 (11th Cir. 1986), reached a similar result, relying on *Guardians* to deny the defendant's motion to dismiss the plaintiff's claim for monetary damages for an intentional violation of Title VI's anti-retaliation regulation.

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question of damages. Justice O'Connor, in a concurring opinion, noted her disagreement with Justice White's limitation on the scope of equitable relief available for the reasons given in Justice Stevens' opinion, *see* 463 U.S. at 612 (O'Connor, J., concurring), but explicitly declined to reach the issue of the availability of damages relief in a private cause of action under Title VI on the ground that petitioners failed to show the requisite intentional discrimination, *see id.* at 612 n.1.

Courts have also extended this interpretation of *Guardians* to Title IX and Section 504. The district court in *Beehler v. Jeffes*, 664 F. Supp. 931, 939-40 and nn.13-14 (M.D. Pa. 1986), read *Guardians* to authorize compensatory damages for intentional violations of Title IX. Similarly, *Wilder v. City of N.Y.*, 568 F. Supp. 1132, 1135 (E.D. N.Y. 1983) relied on *Guardians* to find damages available for violations of Section 504. Indeed, *Wilder* held that damages are available under Section 504 without regard to intent.[9] *See also Storey v. Board of Regents of Univ. of Wis. System*, 604 F. Supp. 1200, 1202 n.3 (W.D. Wis. 1985).[10]

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[9] In addition, numerous courts have awarded damages for violations of Section 504 without reference to whether the discrimination was intentional. *See. e.g., Greater L.A. Council on Deafness v. Zolin Inc.*, 812 F.2d 1103, 1107 (9th Cir. 1987); *Meiner v. State of Missouri*, 673 F.2d 969, 977-79 (8th Cir. 1982), *cert. denied*, 459 U.S. 909, 916 (1982); *Christopher N. v. McDaniel*, 569 F. Supp. 291, 295-96 (N.D. Ga. 1983); *Gregg B. v. Bd. of Educ. of Lawrence School Dist.*, 535 F. Supp. 1333, 1339-40 (E.D. N.Y. 1982) (finding the purpose of section 504 furthered by allowing tuition reimbursement); *Patton v. Dumpson*, 498 F. Supp. 933, 937-39 (S.D. N.Y. 1980). Indeed, the Supreme Court has recognized that a majority of courts to have ruled on the issue have upheld actions for damages under section 504. *Smith v. Robinson*, 468 U.S. 992, 1020 n. 24 (1984).

[10] For other decisions interpreting Guardians as authorizing compensatory damages for intentional violations of the affected statutes, *see. e.g., Manecke v. School Bd. of Pinellas County. Fla.*, 762 F.2d 912, 922 n.8 (11th Cir. 1985) *cert. denied*. 474 U.S. 1062 (1986); *Carter v. Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984); *Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Sabo v. O'Bannon*, 586 F. Supp. 1132, 1138 (E.D. Pa. 1984); *Araujo v. Trustees of Boston College*, 34 Empl. Prac. Dec. (CCH) ¶ 34,409 (D. Mass. Dec. 16,

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While not all lower courts have reached this result, those post-*Guardians* decisions that have refused to imply a damages remedy in the face of an intentional violation of one of the affected civil rights statutes have done so with little analysis and, typically, no mention of *Guardians*.[11] These courts have principally relied, instead, on pre-*Guardians* decisions denying damages relief, such as *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981)[12] and *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982).[13] Indeed, the court below relied on *Drayden* to dismiss Ms. Franklin's claim for damages under Title IX and noted *Lieberman*.

However, *Drayden* and *Lieberman* are no longer good law following *Guardians*. To begin with, the *Guardians*

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1983); *Organization of Minority Vendors Inc. v. Ill. Cent. Gulf R.R.*, 579 F. Supp. 574, 594-95 n.10 (N.D. Ill. 1983). *But see Robinson v. English Dept. of the Univ. of Pa.*, Nos. 87-2476, 87-2554 at 15 (E.D. Pa. Nov. 8, 1988) (LEXIS, Genfed Library, Dist. file) (citing *Guardians* for the proposition that, "although the Supreme Court has not yet ruled upon this precise issue, the prevailing view expressed in caselaw is that a private action under Title VI does not entitle a prevailing plaintiff to general or punitive damages").

[11] *See, e.g., Robinson v. English Dept. of the Univ. of Pa., supra; Bagley v. Hoopes*, No. 81-1126-Z (D. Mass., Aug. 6, 1985) (LEXIS, Genfed Library, Dist. file) (Title IX); *Pruitt v. Ill. Township High School*, No. 83 C 4346 (N.D. Ill. Jan. 20, 1984) (LEXIS, Genfed Library, Dist. file) (Title IX); *Davis v. Spanish Coalition for Jobs. Inc.*, 676 F. Supp. 171 (N.D. Ill. 1988) (Title VI).

[12] *See. e.g.. Davis*, 676 F. Supp. at 172.

[13] *See. e.g., Cannon v. University of Health Sciences/The Chicago Med. School*, 710 F.2d 351 (7th Cir. 1983); Lipsett, 864 F.2d at 884 n.3; *Bagley, supra; Pruitt, supra.*

Court was fully aware of their existence, *Guardians*, 463 U.S. at 602 n.23, but nonetheless took the view that monetary damages should be available in the face of the intentional violation of the statute. In any event, because the court in *Drayden* confined its analysis to the conclusory statement that a cause of action under Title VI is limited to the right to have the discriminatory activity ceased, it is now of no precedential – or even persuasive – value. Similarly, the result in *Lieberman* cannot survive *Guardians*.[14] In *Lieberman*, a Title IX case, the court initially looked to Title VI for guidance. Finding the availability of damages under Title VI unresolved. it relied on its interpretation of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), as prohibiting the inference of an individual damages remedy under spending power legislation, *Id.* at 1187, to find damages unavailable under Title IX. However, as *Guardians* adopted a different view of *Pennhurst* in the case of intentional discrimination, *Lieberman's* analysis cannot survive. The Seventh Circuit itself took the opposite view as it held, post-*Guardians*, that damages are available in the face of an intentional violation of Title VI. *See Craft v. Board of. Trustees*, 793 F.2d at 140. See discussion *infra* regarding the impact of *Pennhurst* on this case.

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[14] At least one court in the Seventh Circuit has noted the inconsistency between *Lieberman* and *Guardians*. *See Organization of Minority Vendors. Inc. v. Ill. Cent. Gulf R.R., et al.*, 579 F. Supp. 574, 595 n.10 (N.D. Ill. 1983); *see also Beehler v. Jeffes*, 664 F. Supp. 931, 939-40 and nn.13-14 (M. D. Pa. 1986) (acknowledging *Lieberman*, but holding that, based on Guardians plaintiffs could recover damages for an intentional violation of Title IX).

B. FULL MONETARY DAMAGES ARE AVAILABLE WITHOUT LIMITATION TO EQUITABLE RELIEF

Given the clear authority for the award of damages when discrimination is shown, courts have begun to address the issue of the extent of damages which are available under the affected statutes. Most have held that the full range of compensatory damages is appropriately invoked. *See. e.g., Recanzone v. Washoe County School Dist.*, 696 F. Supp. 1372, 1378 (D. Nev. 1988) (awarding damages for emotional and psychological distress in section 504 employment discrimination case); *accord Fitzgerald v. Green Valley Area Education Agency*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984). This follows the well-established principle that monetary compensation for all injuries, including emotional distress, humiliation and indignity is the rule under the civil rights laws unless there is statutory language to the contrary. *See, e.g., Carey v. Piphus* 435 U.S. 247, 263-64 (1978) (Section 1983); *H.C. by Hewett v. Jarrard* 786 F.2d 1080, 1088 (11th Cir. 1986) (Section 1983); *Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985) (Sections 1981 and 1983); *Miener v. State of Missouri*, 673 F.2d at 977 ("the right to seek damages for civil rights violations is an accepted feature of the American judicial system.")

Some courts, in contrast, have held that compensatory damages may be limited to equitable relief under statutes prohibiting discrimination in federally assisted programs. In particular, in addressing claims of employment discrimination under Section 504, several courts have limited plaintiffs to the equitable remedies available under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§ 2000e.[15] In reaching this conclusion, they have sought to avoid what they perceived as the inconsistency of providing broader remedies for employment discrimination under Section 504 than under Title VII.

This Court should not limit Ms. Franklin's remedy to equitable relief for at least two reasons. First, although both Title IX and Title VII prohibit discriminatory behavior, they have markedly different remedial schemes. Second, where discrimination in non-employment matters is involved, the concern raised by the existence of inconsistent remedial schemes is not an issue.

Title VII provides for specific remedies, including injunctions restraining unlawful employment practices, hiring or reinstatement of employees, back pay and "any other *equitable relief* as the court deems appropriate," 42 U.S.C. § 2000e-5(g) (emphasis added). Courts have reasonably construed these remedies to be exclusive.[16] Title IX contains no such language in its remedial provision, and the Supreme Court has determined that its explicit remedial scheme is not exclusive. *Cannon v. University of Chicago*, 441 U.S. at 677. Consequently, no basis exists for

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[15] See *Byers v. Rockford Mass Transit*, 635 F. Supp. 1387 (N.D. Ill. 1986); *Shuttleworth v. Broward County*, 649 F. Supp. 35 (S.D. Fla. 1986); *Bradford v. Iron County C-4 School District*, 37 Emp. Prac. Dec. (CCH) ¶ 35,404 (E.D. Mo., June 13, 1984). Amici believe that these cases were wrongly decided but because they are distinguishable from the instant case, *see infra*, this Court need not reach this issue.

[16] *See, e.g., Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982); *Padway v. Palches*, 665 F.2d 965, 968, (9th Cir. 1982).

limiting Title IX remedies to the statutory remedies provided under Title VII. The Supreme Court has recently confirmed that compensatory damages not available under the Title VII remedial scheme are clearly allowed in the analogous context of employment discrimination cases brought under 42 U.S.C. §1981. *Patterson v. McLean Credit Union*, 57 U.S.L.W. 4705, 4709 n.4 (June 13, 1989). *See also Stallworth v. Shuler*, 777 F.2d 1431 (11th Cir. 1985) (award of damages for emotional distress and humiliation); *Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108 (3d Cir. 1988); *Carter v. Duncan-Huggins Ltd.*, 727 F.2d 1225 (D.C. Cir. 1984).

Furthermore, allowing compensatory damages in non-employment claims under Title IX – such as this case – in no way creates a remedial scheme which is inconsistent with that of any other applicable statute. Indeed, limiting victims of non-employment discrimination to equitable relief has substantially more restrictive consequences than it does in employment cases. In particular, equitable relief in employment cases includes a monetary award in the form of back pay, providing victims of discrimination with significant compensation for their injuries. But as a practical matter, limiting Ms. Franklin to equitable relief would likely foreclose the availability of any compensation for her injuries. Ms. Franklin should be compensated for the full extent of her emotional and any other injuries caused by the deprivation of her civil rights at issue in this case.[17]

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[17] *Amici* also note several decisions which have declined to permit a cause of action under 42 U.S.C. § 1983 to enforce the

(Continued on following page)

In sum, *Guardians* and its progeny strongly support the availability of the full range of compensatory damages – including compensation for emotional injuries – for the intentional violation of Title IX. The lower court erred in failing to reach this result.

III. CONTRARY TO THE CONCLUSION OF THE LOWER COURT, THERE IS NO CONSTITUTIONAL IMPEDIMENT TO THE AWARD OF DAMAGES IN THIS CASE

The lower court relied for its determination that damages are not available under Title IX, in substantial part, on the view that Title IX is spending power legislation and private remedies are, accordingly, limited. *Slip op.* at 4. Because Congress based Title IX on its authority under Section 5 of the fourteenth amendment in addition to the spending power, and intended to create individually enforceable rights secured by a damages remedy, this reasoning is misplaced. Further, intentional discrimination constitutes an exception to the principle that individual remedies may not be implied under spending power legislation. There is no constitutional impediment to the award of damages in this case.

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statutes at issue. Relying on *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.*, 453 U.S.1 (1981), they have found that these statutes create comprehensive remedial schemes which preclude access to § 1983. *See. e.g., Tyus v. Ohio Dept. of Youth Services*, 606 F. Supp. 239 (S.D. Ohio 1985); *Mabry v. State Bd. for Community Colleges*, 597 F. Supp. 1235 (D. Colo. 1984), *aff'd on other grounds*, 813 F.2d 311 (10th Cir.), *cert. denied.* 108 S. Ct. 148 (1987). Section 1983, of course, provides a damages remedy. *See, e.g., Carey v. Piphus*, 435 U.S. at 247.

A. BECAUSE TITLE IX IS BASED ON CONGRESS'S AUTHORITY TO ENFORCE THE FOURTEENTH AMENDMENT, AND CONGRESS INTENDED THE AVAILABILITY OF MONETARY RELIEF, A DAMAGES REMEDY IS PROPERLY INVOKED

The lower court's point of reference was *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), which raised the question of whether the Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. §§ 6000 *et. seq.* created individually enforceable rights and obligations.[18] The *Pennhurst* Court's inquiry focused on congressional intent to create such individual rights, which, in turn, was closely linked to the constitutional authority for the legislation:

> In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate, namely, Congress' power to enforce the Fourteenth Amendment and its power under the Spending Clause to place conditions on the grant of federal funds.

Pennhurst, 451 U.S. at 15.

Spending power legislation, which is "much in the nature of a contract," binds the recipient of federal funds "to comply with federally imposed conditions" which are "unambiguously" expressed in connection with the grant

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[18] As Justice Stevens properly pointed out in his dissent to *Guardians*, *Pennhurst* "concerned the existence or non-existence of statutory rights, not remedies." *Guardians*, 463 U.S. at 636. Nonetheless, as the lower court would extend *Pennhurst* to the question of remedies, *Amici* will consider its impact on the availability of damages.

of those funds. *Id.* at 17;[19] *see also Guardians*, 463 U.S. at 596. By contrast, Congress' authority to enforce the fourteenth amendment is not dependent on the concept of the knowing acceptance of contract terms. Rather, Congress has the power to impose unilaterally "rights and obligations," *Pennhurst*, 451 U.S. at 17, to achieve the fourteenth amendment's promise of equality under the law.

A review of Title IX and its legislative history shows that, unlike the legislation at issue in *Pennhurst*, which was nothing "other than a typical funding statute," *id.* at 22, and therefore did not give rise to individually enforceable rights, Title IX is substantially more. It certainly has contractual, and hence, spending power implications, as Justice White determined in *Guardians*, 463 U.S. 582, at 596-603 (1983), although it is noteworthy that only one other member of the Court joined his opinion. However, Title IX also unmistakably bears the imprint of the fourteenth amendment as it creates individually enforceable rights through an implied private right of action. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Such a private right of action could not be inferred in legislation based solely on the spending power. *See Pennhurst*, 451 U.S. at 1. As the Court in *Cannon* held:

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to

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[19] When acting in accordance with these principles, Congress can create individually enforceable rights and obligations under its spending power authority. *See Pennhurst*, 451 U.S. at 17; *cf. Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).

> provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.

Id. at 704.[20]

To be sure, Title IX's contemporaneous legislative history does not address the precise question of the constitutional authority under which it was enacted. Nonetheless, in addition to *Cannon's* analysis of that history as just set forth, two subsequent Acts of Congress substantially affecting Title IX, and the Supreme Court decision giving rise to one of them, make the fourteenth amendment connection clear. These include the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (Section 1988) and the Civil Rights Remedies Equalization Act Amendment, section 1003 of the Rehabilitation Act of 1986, 42 U.S.C. § 2000d-7, which reversed the Supreme Court's decision in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985).

Section 1988 authorizes attorneys fees to prevailing parties in actions to enforce a series of civil rights statutes including, *inter alia*, Title IX. Congress expressly invoked its authority under the fourteenth amendment in enacting the legislation:

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[20] The assumption that Title IX is simply spending power legislation, in large part based on Justice White's opinion in *Guardians, cf. U.S. v. Alabama*, 828 F.2d 1532, 1547 (11th Cir. 1987), overlooks the second congressional objective so clearly stated in *Cannon*. *Amici* respectfully submit that findings to such effect should be reviewed in light of the analysis, *infra*, showing the strong fourteenth amendment implications of Title IX.

> Fee awards are therefore provided in cases covered by S.2278 [the bill which was enacted into law] in accordance with Congress' powers under, inter alia, the Fourteenth Amendment, Section 5.

S. Rep. No. 1011, 94th Cong. 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5913.[21] Because Section 1988 itself creates no rights, drawing its substance from the statutes it is designed to enforce, the only inference to be drawn from this history is that the underlying statutes were also designed to enforce the fourteenth amendment.[22] This very much includes Title IX.

The fourteenth amendment link, generally, and the availability of monetary damages, in particular, is further strengthened by the Supreme Court's decision in *Atascadero* and Congress' response to it. *Atascadero* addressed the question of whether Section 504 of the

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[21] *See also Cannon*, 441 U.S. at 686 n.7 (quoting Senator Kennedy, 122 Cong. Rec. 31472 (1976)) ("It is Congress' obligation to enforce the 14th Amendment by eliminating entirely such forms of discrimination, and that is why both title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 have been included [in the amendment to § 1988].")

[22] *Cannon* relied on this legislative record in determining that there is a private right of action under Title IX. While the Court acknowledged that post-enactment history does not have "the weight of contemporary legislative history" it recognized that it would be "remiss if [it] ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within 'the civil rights enforcement scheme' that successive Congresses have created over the past 110 years." *Cannon*, 451 U.S. at 686 n.7.

Rehabilitation Act abrogated the states' eleventh amendment immunity. The majority did not reach the ultimate question of whether Section 504 was enacted pursuant to the fourteenth amendment, but based on the record before it, the Court assumed that it was. *Id.* at 244 n.4. Indeed, the holding of the case is explicitly based in part on the Court's interpretation of the fourteenth amendment requirements for abrogating the sovereign immunity of states. *See id.* at 242-246. Further, in the dissent, per Justice Blackmun, four justices took the express position that Section 504 was an exercise of Congress' power under Section 5 of the fourteenth amendment. *Id.* at 304.

In response, Congress promptly passed the Civil Rights Remedies Equalization Amendment, which expressly abrogates the eleventh amendment immunity of the states for violations of, *inter alia*, Title IX.[23] Congress explicitly invoked its authority both under Section 5 of the fourteenth amendment and the spending power clause in enacting the amendment. S. Rep. No. 388, 99th Cong. 2d Sess. 27 (1986).[24] The Senate Report is included in the attached appendix.

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[23] It also applies to Section 504, the Age Discrimination Act, Title VI, and the provisions of any other federal statute prohibiting discrimination by recipients of federal financial assistance.

[24] As with the history of Section 1988, this legislative history is highly probative of the pending question. As this Court has held in a similar context, "although the views of a subsequent Congress cannot override the *unmistakable* intent of the enacting one, such views are entitled to 'significant weight,' and 'particularly so when the precise intent of the

(Continued on following page)

In addition, in describing the legislation, Congress made it clear that assuring the availability of monetary damages under the enumerated statutes was one of its principal concerns. The Senate report, for example, describes *Atascadero* as holding "that the eleventh amendment bars suits against States and State agencies in Federal Court for retroactive *monetary relief* under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794." S. Rep. 388, 99th Cong. 2d Sess. 27 (1986) (emphasis added). It similarly describes the effect of the amendment:

> Section 1003 also explicitly provides that in a suit against a State for a violation of any of these statutes remedies, *including monetary damages*, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State.

Id. at 28 (emphasis added).[25]

Further, in its communication to the Congress in connection with the legislation, the Administration described *Atascadero* as proscribing monetary relief based on eleventh amendment considerations. The clear implication is that monetary damages would be available but for the issue of sovereign immunity. *See* Letter from

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(Continued from previous page)

enacting Congress is obscure,' " (citations omitted). *Powell By and Through Powell v. Schweiker*, 688 F.2d 1357, 1363 (11th Cir. 1982); *see also Glidden Company v. Zdanok*, 370 U.S. 530, 541 (1962).

[25] *See also* remarks of Senator Cranston, 132 Cong. Rec. S15104, S15105 (daily ed. October 3, 1986) (describing the legislation as reversing *Atascadero's* preclusion of a damages remedy under Section 504).

Assistant Attorney General John R. Bolton to Senator Orrin Hatch, 132 Cong. Rec. S15105, S15106 (daily ed. October 3, 1986).[26]

B. IN THE ALTERNATIVE, A DAMAGES REMEDY FOR INTENTIONAL DISCRIMINATION IS PROPERLY INVOKED UNDER SPENDING POWER LEGISLATION.

Even if this Court determines that Title IX is spending power legislation, the award of damages is still appropriate. In delivering the opinion of the Court in

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[26] Further support for *amici's* contention that Title IX is based in the fourteenth amendment stems from *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978) where the Court held that Title VI incorporates fourteenth amendment standards regarding prohibited racial discrimination. While the precise question has not been reached in the context of Title IX, the Supreme Court has held that Title VII's prohibition of sex discrimination incorporates fourteenth amendment principles, *see General Electric Co. v. Gilbert*, 429 U.S. 125, 133-34 (1976) and a number of courts have applied Title VII principles in Title IX cases. *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d at 896-897,; *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316-317 (10th Cir.) *cert. denied*, 108 S.Ct. 148 (1987). *Cf. U.S. v. New Orleans Public Service Inc.*, 553 F.2d 459, 467 (5th Cir. 1977), *cert. denied*, 454 U.S. 892 (1981) (" . . . equal employment goals themselves, reflecting important national policies, validate the use of the procurement power in the context of [Executive Order 11246, prohibiting federal contractors from discriminating on the basis of race, color, religion, sex or national origin]"); *Legal Aid Society of Alameda County v. Brennan*, 381 F. Supp. 125, 130 (N.D. Cal. 1974), *aff'd*, 608 F.2d 1319 (9th Cir. 1979) (" . . . Executive Order 11246 also has firm foundations in the fifth and fourteenth amendments to the Constitution. . . . ").

Guardians, Justice White set out intentional discrimination as an exception to the general prohibition against inferring individual remedies to enforce spending power legislation:

> In cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.

Guardians at 597. Justice White based his conclusion in traditional principles of contract law, which is fully consistent with the contract-based view of Congress' spending power authority:

> It is not uncommon in the law for the extent of a defendant's liability to turn on the extent of his knowledge or culpability. Thus, it has been said that, under principles of contract law, a contracting party cannot be held liable for extraordinary harm due to special circumstances unless, at the time the contract was made, he knew or had reason to know the circumstances that made such extraordinary injury probable 'so as to have the opportunity of judging for himself as to the degree of this probability.' (citations omitted)

Id. at 597 n.20. *See Organ. of Minority Vendors v. Ill. Cent. Gulf R.R.*, 579 F. Supp. at 594-95 n.10.

In sum, contrary to the opinion of the lower court, limitations on inferring individual remedies under spending power legislation do not apply to this case. This is because Title IX is based on Congress' power under

Section 5 of the fourteenth amendment and the relevant history establishes that Congress intended to create individual rights secured by a damages remedy. Even if this Court determines that Title IX is solely spending power legislation, intentional discrimination stands as an exception to the general rule against inferring individual remedies. This view, in fact, formed the basis of Justice White's opinion in *Guardians*.

CONCLUSION

For the above-stated reasons, *amici* respectfully request this Court to reverse the decision below and remand this case for further proceedings on the merits.

Respectfully submitted,

/s/ Marcia D. Greenberger
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DATED: July 7, 1989

APPENDIX

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* It has a deep and abiding interest in assuring the availability of appropriate and effective remedies under Title IX, including monetary damages.

The American Association of University Women (AAUW) promotes equity for women, education and self-development over the life span, and positive societal change. AAUW includes 140,000 members nationwide and 1,700 local branches. Vigorous enforcement of Title IX is an AAUW priority.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, membership organization dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. The ACLU of Georgia is a state-wide affiliate of the ACLU.

The Americans for Democratic Action (ADA), a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academicians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others. ADA is dedicated

to the achievement of freedom, equality of opportunity, economic security and peace for all people through education and political action.

The Center for Women Policy Studies (CWPS) is a non-profit feminist organization founded in 1972. CWPS is dedicated to research and advocacy to further women's rights. One of CWPS' priorities is the achievement of educational equity. To that end CWPS supports a broad and effective interpretation of Title IX.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of more that [sic] 65 International Unions. CLUW has 45 active chapters throughout the United States and a National Executive Board composed of the female leadership of these International Unions. A primary purpose of this national coalition is to unify all Union Women in a viable organization dedicated to the achievement of participation of women within their unions and to removing all forms of discrimination from the workplace.

Disability Rights Education and Defense Fund (DREDF) is a national disability civil rights law reform organization, dedicated to establishing equal opportunity for over 36 million disabled Americans. As such, DREDF engages in education, advocacy, litigation, and policy reform efforts with a particular focus on the effective enforcement of Section 504.

The Displaced Homemakers Network is comprised of over 1000 local programs that provide education and training services to midlife and older women seeking to enter and reenter the job market. The Network seeks to

increase displaced homemakers' options for economic self-sufficiency.

The Mental Health Law Project (MHLP) is a non-profit public interest organization established in 1972 to protect and expand the legal rights of mentally ill and mentally retarded children and adults. MHLP has represented thousands of people with mental disabilities in individual cases and class actions establishing fundamental rights.

The Mexican American Legal Defense and Educational Fund is a national civil rights organization established in 1967. Its principal objective is to secure through litigation and education, the civil rights of Hispanics living in the United States.

The National Association for Girls and Women in Sport (NAGWS) is a non-profit organization for Girls and Women in Sport. One of our basic interests is in achieving sex equity for athletes and in supporting equity for all individuals. We believe that discrimination cannot continue and, therefore, are in support of this *amicus* brief.

The National Organization for Women, Inc. (NOW) is the largest feminist organization in the United States, and has as its goal to bring full equality to women. Essential to that goal is equal educational opportunity for all women and girls. From its inception NOW has worked on issues of equal education including Title IX and the Civil Rights Restoration Act restoring the full scope of Title IX. NOW has a strong interest in cases such as this one which seek to ensure remedies for victims of discrimination through rigorous enforcement of Title IX.

The NOW Legal Defense and Education Fund is one of the nation's foremost nonprofit advocacy organizations dedicated to the elimination of sex discrimination. Since its inception in 1970, the NOW Legal Defense and Education Fund has been involved in many federal and state cases concerning the issues of sexual harassment, education and women's civil rights.

NOW Legal Defense and Education Fund is especially concerned with the issues raised in this case because of the importance of ensuring that women and girls receive non-discriminatory education under non-discriminatory conditions. Sexual harassment is a serious problem for women and girls in many settings, including housing, employment and education; NOW LDEF is committed to working for adequate relief for all victims of such abuse.

The Older Women's League (OWL) was founded in 1980 to address the concerns of midlife and older women. It currently has over 20,000 members and donors and over 100 chapters in 36 states. Midlife and older women are profoundly affected by the question presented in this case. Equitable access to education and education-related employment opportunities is essential to midlife and older women's economic security.

Women Employed is a national membership association of working women. Over the past sixteen years, the organization has assisted thousand of women with problems of discrimination, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts.

Women's Equity Action League (WEAL) was founded in 1968 as a national, non-profit membership organization sponsoring research, education, litigation and advocacy in order to advance the economic status of women. WEAL supports and recognizes a women's [sic] constitutional right to equal opportunity in education and therefore has an interest in supporting as *amici curiae* the National Women's Law Center in *Franklin v. Gwinnett Public Schools*.

The Women's Law Project (WLP) is a nonprofit law firm dedicated to advancing the status and opportunities of women through litigation, public education and public policy advocacy. WLP believes that access to equal educational opportunities is essential to achieving equal rights for women, and has litigated extensively during the past 15 years to achieve educational equity for women and girls. The Women's Law Project therefore has a strong interest in the availability of strong and effective remedies under Title IX of the Education Amendments of 1972, including compensatory damages.

S. Rep. No. 388, 99th Cong. 2d Sess. 1, 27-28, 41 (1986)

Calendar No. 809

99TH CONGRESS *2d Session*	)	SENATE	((	REPORT 99-388

REHABILITATION ACT AMENDMENTS OF 1986

AUGUST 8 (legislative day, AUGUST 4), 1986 –
Ordered to be printed

Mrs. HAWKINS (for Mr. HATCH), from the Committee on Labor and Human Resources, submitted the following

REPORT

[To accompany S. 2515]

The Committee on Labor and Human Resources, to which was referred the bill (S. 2515) to reauthorize the Rehabilitation Act of 1973, to authorize a supported employment program for severely disabled individuals, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. SUMMARY OF THE BILL

As approved by the Senate Committee on Labor and Human Resources, the Rehabilitation Act Amendments of 1986 reauthorizes the Rehabilitation Act programs through fiscal year 1990.

The bill amends the purpose of the Rehabilitation Act contained in Section 208 of the Act, to maximize the employability, independence and integration into the work place and the community of handicapped individuals as a purpose of the programs authorized under the Act.

Section 102 of the bill requires the Secretary of Education to ensure that the staffing of the Rehabilitation Services Administration is in sufficient numbers and at levels that will maintain quali-

* * *

be able to continue to meet the needs of these discrete groups while seeking to serve individuals with a range of disabilities.

TITLE XI – HELEN KELLER NATIONAL CENTER

Section 901. Reauthorization

Section 901 of the Committee bill amends Section 205(a) of the Helen Keller National Center Act to extend authorization of this program at such sums as necessary through 1990.

TITLE X – TECHNICAL AND MISCELLANEOUS PROVISIONS

Section 1001. Technical amendments

Section 1001 of the Committee bill makes numerous technical and conforming amendments.

Section 1002. President's Committee on Employment of the Handicapped

Section 1002 of the Committee bill amends the authorizing legislation for the President's Committee on Employment of the Handicapped so that such committee shall be guided by the general policies of the National Council on the Handicapped. The Committee believes that the President's Committee on Employment of the Handicapped should coordinate its activities with those of the National Council on the Handicapped to provide a cohesive approach to meeting the employment needs of our nation's disabled citizens.

Section 1003. Civil rights remedies equalization

Section 1003 of the Committee bill clarifies the intent of Congress where violations of Section 504 by recipients of Federal financial assistance are concerned.

These provisions are derived from S. 1579 and Amendment No. 584 thereto, introduced on August 1, 1985, by Senator Cranston, and cosponsored by Senators Stafford, Kennedy, Weicker, Kerry, Riegle, Simon, Burdick and Metzenbaum.

The Supreme Court in *Atascadero State Hospital v. Scanlon*, 473 U.S. ___, 87 L.Ed.2d 171, 105 S.Ct. 3142 (1985), held that the Eleventh Amendment bars suits against States and State agencies in Federal court for retroactive monetary relief under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sec. 794. Justice Powell, writing for the majority, noted that the Eleventh Amendment bars a citizen from bringing suit against his or her own State in Federal court but that there are certain

exceptions to this prohibition. The Court stated explicitly that these exceptions include a waiver of immunity by a State and congressional power to limit the amendment when legislating pursuant to Section 5 of the Fourteenth Amendment and clearly implied that an exception could be provided under the spending Clause. Justice Powell found that none of these exceptions applied here because a state waiver was lacking and Congress had not abrogated the Eleventh Amendment by an unequivocal expression of congressional intent.

The Supreme Court's decision misinterpreted congressional intent. Such a gap in Section 504 coverage was never intended. It would be inequitable for Section 504 to mandate state compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue. In order to make certain that the States are covered by Section 504, the Rehabilitation Act Amendments of 1986 provide that states shall not be immune under the Eleventh Amendment from suit in Federal court for violations of Section 504. In addition, since language similar to that of Section 504 is contained in Title IX of the Education Amendments of 1972, 20 U.S.C. Sec. 1681, Title VI of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000d, and the Age Discrimination Act of 1975, 42 U.S.C. Sec. 6102, these statutes have also been included in the specific abrogation of state immunity in the Committee bill. Other Federal statutes which prohibit discrimination by recipients of Federal financial asistance [sic] are also included. Section 1003 also explicitly provides that in a suit against a State for a violation of any of these statutes, remedies, including monetary damages, are available to the same

extent as they would be available for such a violation in a suit against any public or private entity other than a State. This is in keeping with our intent to provide litigants in cases against States and State agencies the same protection they have in other situations.

Finally, this provision takes effect with respect to violations that occur in whole or in part after the date of enactment of this legislation.

IV. Tabulation of Votes Cast in Committee

In Executive Session of the Committee on Labor and Human Resources on Wednesday, August 6, 1986, S. 2515 as amended, passed unanimously.

V. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, August 8, 1986.

Hon. Orrin G. Hatch,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 2515, the Rehabilitation Act Amendments of 1986, as ordered reported by the Senate Labor and Human Resources Committee on August 6, 1986.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Edward Gramlich
(For Rudolph G. Penner).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2515.

2. Bill title: Rehabilitation Act Amendments of 1986.

3. Bill status: As ordered reported by the Senate Committee on Labor and Human Resources on August 6, 1986.

* * *

TITLE IX – HELEN KELLER NATIONAL CENTER

Section 901. Reauthorization

This section amends section 205(a) of the Helen Keller Center Act to authorize such sums as may be necessary through FY 1990.

TITLE X – TECHNICAL AMENDMENTS AND MISCELLANEOUS PROVISIONS

Section 1001. Technical Amendments

This section consists of technical amendments to the Act.

Section 1002. Presidents Committee on Employment of the Handicapped

This section provides that the President's Committee on Employment of the Handicapped is to be guided by the general policies of the National Council on the Handicapped.

Section 1003. Civil Rights Remedies Equalization

This section provides that a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance. In a suit against a State for a violation of any of these statutes, remedies are to be available for such violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State. These provisions are to take effect with respect to violations that occur in whole or in part after the date of enactment of the Rehabilitation Act Amendments of 1986.

Section 1004 Effective Date

This section provides that the Rehabilitation Act Amendments of 1986 are to take effect October 1, 1986.

VIII. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a

print of the statute or the part or sections thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

Rehabilitation Act of 1973

(as amended by public law 98-221)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act with the following table of contents, may be cited as the "Rehabilitation Act of 1973").

CERTIFICATE OF SERVICE

I nereby certify that on July 7, 1989, copies of the foregoing Brief of the National Women's Law Center, *et al.* as *Amici Curiae* was served by first-class mail, postage prepaid, upon:

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Respectfully submitted,

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(2)

No. 90-918

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CHRISTINE FRANKLIN,

Petitioner,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a LOCAL EDUCATION AGENCY (LEA);
DR. WILLIAM PRESCOTT, an Individual,

Respondents.

Brief In Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Rule 24.2 of the Rules of the Supreme Court provides that a brief by a respondent need not set forth the "Questions Presented for Review" unless Respondent is dissatisfied with the presentation by the Petitioner. Respondents believe that the Petitioner's issues are unnecessarily conditional and complicated. Respondents contend that the only real question presented for review is:

I.

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq. allows compensatory damages to an individual for a violation of Title IX, in addition to the remedies plainly provided by Title IX.

PARTIES

Respondents agree with the deliniation of the parties as provided by the Petitioner in her brief, except that the correct title for the governmental entity is the Gwinnett County School District, which has been incorrectly sued in this action as "Gwinnett County Public Schools."

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OPINIONS BELOW

Petitioner has correctly recited the opinion of the United States Court of Appeals for the Eleventh Circuit as Franklin v. Gwinnett County Public Schools, et al., 911 F.2d 617 (11th Cir. 1990), and has provided the unreported opinion of the Honorable Orinda D. Evans, Judge, United States District Court for the Northern District of Georgia as Appendix B to Petitioner's Brief.

JURISDICTION

Respondents agree with Petitioner's statement of jurisdiction.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Respondents are dissatisfied with Petitioner's statement of the Constitutional and statutory provisions involved in this appeal. It is clear that Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, et seq. is the focus of this appeal, as Petitioner urges this Court to expand the remedies allowed under Title IX to include compensatory damages.

Petitioner contends that § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, et seq. is also applicable. Respondents agree that, to the extent that Title VI served as the legislative antecedent for Title IX, an analysis of Title VI cases may be helpful in interpreting Title IX.

Respondents do not agree that the Fourteenth Amendment is directly involved in an analysis of this case, nor do Respondents agree that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. pertaining to employment situations, is applicable to the case at bar.

STATEMENT OF THE CASE

This case is one of three legal actions initiated by Petitioner, a former high school student, now graduated, against the Gwinnett County School District, (incorrectly sued as Gwinnett County Public Schools), Dr. William

Prescott, (hereinafter "Gwinnett County," "Respondent School District," "Dr. Prescott," and "Respondents"), and the individual teacher, seeking compensatory and punitive damages. The case at bar was a federal court action brought under Title IX because of alleged sexual discrimination. Petitioner claims that she suffered this discrimination as a result of alleged advances made upon her by an individual high school faculty member. Respondents moved to dismiss Petitioner's United States District Court action for failure to state a claim under F.R.C.P. 12(b (6), on the grounds that Petitioner's Title IX claim was moot. Gwinnett County had been found to be in compliance with the requirements of Title IX by the Office for Civil Rights, as Petitioner herself established by amending her complaint to include as an exhibit the findings of the Office for Civil Rights. Both individuals against whom Petitioner made claims, the individual faculty member and Dr. Prescott, were no longer present at the school at the time Petitioner filed her case. Furthermore, Title IX does not provide for an action against an individual such as Dr. Prescott, and for that reason, as well as the mootness of Petitioner's claim, the Respondents urged that the Petitioner's complaint should be dismissed.

Petitioner responded to this motion at the trial level by basically conceding that the only issue left for determination by the district court was that of whether compensatory damages were recoverable under Title IX. The district court below granted Respondents' Motion to Dismiss, and

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit considered all of Petitioner's arguments urging that the remedies provided by Title IX should include compensatory damages to an individual such as Petitioner. However, the Eleventh Circuit affirmed the decision of the district court, holding that the desired expansion of remedies under Title IX did not seem to be authorized by any authorities presented by Petitioner. The dispute now moves to the United States Supreme Court on Petitioner's Application for Writ of Certiorari.

FACTS OF THE CASE

As this matter is on appeal from a motion to dismiss pursuant to F.R.C.P. 12(b)(6), Respondents herein are required to operate as if the facts, alleged by Petitioner below in her complaints, are true. Respondents contended successfully, both at the trial court and before the Eleventh Circuit, that Petitioner simply had no cause of action under Title IX as alleged in her complaint, regardless of the underlying facts. However, Respondents wish to advise this Court that Petitioner's Application for Writ of Certiorari contains a statement of facts which is significantly expanded from that which is actually contained in the record below. Respondents consider Petitioner's expansion of facts as an attempt to sensationalize what is plainly a legal issue, and one that is virtually distinct from the underlying facts.

Respondents submit that the origin of Petitioner's expanded facts is her state court action against the allegedly offensive faculty member, Franklin v. Hill, Civil Action File No. 88A-3696-5, pending in the Superior Court of Gwinnett County, Georgia, before the Honorable Richard T. Winegarden, and in which Petitioner has conducted numerous depositions. Additionally, Petitioner instituted a state court action against the Gwinnett County School District, as well as the individual principal and guidance counselor of her former high school, alleging the same violations of Title IX as contained in the instant case, as well as counts based on state law and 42 U.S.C. § 1983. Franklin v. Gwinnett County Public School, Dr. Franklin Lewis and Virginia Lacy, currently before the Georgia Court of Appeals, Docket No. A91A0113, on appeal from a dismissal by the trial court on grounds of res judicata.

In essence, the facts as they are alleged below involve a female high school student who claims that she was sexually harassed by an individual faculty member from whom she had taken one economics class the year before. Petitioner claims that she engaged in sexual intercourse with this faculty member on three occasions, each time willingly, though she does claim that she was intimidated and coerced into these acts of sexual intercourse. There is no allegation that Petitioner traded sex for academic advancement. There is no allegation that this individual faculty member had any position of authority with the Respondent School District beyond that of a mere teacher. There is no allegation that the

Respondents had any direct knowledge of the alleged sexual relationship until Petitioner herself communicated her claim to a female faculty member, who immediately notified the school guidance counselor, who in turn initiated a prompt and complete investigation.

Petitioner does allege that the high school administrators knew or should have known of certain sexually harassing conduct by the alleged offending faculty member, but the basis of the "knowledge" consists of vague comments made by other students, not Petitioner, and none of the comments specifically identified a sexual relationship between Petitioner and the faculty member. Although Petitioner makes the bald allegation that she has been intentionally discriminated against by Respondents herein, her factual allegations do not support this conclusion of intentional discrimination. The allegations against Dr. Prescott are against him individually, not as any school authority. He served only as band director and music teacher; there is no allegation that he was, or acted as, a member of the school administration.

Petitioner instituted an investigation by the Office for Civil Rights, which concluded that while technical violations of Title IX had occurred, the Gwinnett County School District was in compliance with the mandates of Title IX. This is set forth in the OCR report attached to Petitioner's amended complaint. In the case at bar, Petitioner alleged no violation of 42 U.S.C. § 1983 nor of any federal statute other than Title

IX. As the trial court found Petitioner's federal claim to be moot, her case was dismissed.

SUMMARY OF ARGUMENT

Title IX does not authorize compensatory damages to an individual. The expansion of Title IX remedies to include compensatory damages is not authorized by the statute itself, nor by the legislative history of Title IX. The remedies provided by Title IX include injunctive relief and the withdrawal of federal funding. These remedies are appropriate, as Title IX is a part of federal funding legislation. The remedy sought by Petitioner ironically could potentially do more harm than good to an institution in a purported effort to cure a violation. Petitioner would divert the very federal funding that she alleges was improperly utilized by an educational institution and channel it instead into Petitioner's own pocket as compensatory damages. In addition, Petitioner's desired remedy would have the effect of subjecting any given educational institution to potentially unlimited liability for monetary damages when the contractual nature of Title IX only provides limited federal funding to begin with.

The case law relied upon by Petitioner in support of her position does not authorize compensatory damages to an individual for alleged intentional discrimination. Petitioner draws her conclusion from the holding of the case that unintentional discrimination does not merit compensatory damages. Petitioner reads too much into this particular

Supreme Court decision, Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed. 2d 866 (1983).

A recent decision from the Third Circuit, Pfeiffer v. Marion Center Area School District, et al., 917 F.2d 779 (3rd Cir. 1990) does not represent an actual split from decisions previously rendered in both the Seventh and Eleventh Circuits, as Petitioner would contend. The Pfeiffer opinion is factually distinguishable from the case at bar, and what is more, the Pfeiffer court's reasoning is incomplete, as no provision is made for the origin of the compensatory damages, assuming Ms. Pfeiffer can even show any. Therefore, the perceived split of authority between the circuits is not mature for consideration by the Supreme Court.

Even assuming for the sake of argument that Petitioner's interpretation of her chosen authorities is correct, such that the law authorizes compensatory damages for intentional discrimination in violation of Title IX, the facts of the instant case do not constitute intentional discrimination. The clear holding of Petitioner's chief supporting case, Guardians, supra, does not authorize Petitioner's desired remedy in cases of unintentional discrimination. The facts of the case at bar can only be shown to interpret unintentional discrimination, if any, by Respondents herein.

Title IX does not authorize actions against an individual, such as Respondent Dr. Prescott. Petitioner has essentially abandoned her claim against Dr. Prescott, though he is still noted by Petitioner as a Party to this action.

In conclusion, the decisions of both the trial court below and the Eleventh Circuit Court of Appeals were correct, and should not be disturbed. Ms. Franklin's Petition for Writ of Certiorari should be DENIED.

RESPONDENTS' ARGUMENTS AGAINST GRANTING THE PETITION

I. TITLE IX DOES NOT AUTHORIZE COMPENSATORY DAMAGES TO AN INDIVIDUAL SUCH AS PETITIONER

A. Background Of Title IX.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., (hereinafter "Title IX") was enacted by Congress pursuant to its powers under the Spending Clause of the United States Constitution. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, at 599, 103 S.Ct. 3221, at 3231, 77 L.Ed. 2d 866 (1983) (hereinafter referred to as "Guardians" throughout this brief). Basically, Title IX provides that federal funding will be provided to educational institutions for use in furthering the education of students without regard to their sex. The arrangement is considered quasi-contractual in nature; the receiving institution agrees not to discriminate on the basis of sex in exchange for the provision of limited funding by the

federal government. Guardians, supra, 463 U.S. at 596, 103 S.Ct. at 3229.

B. The Supreme Court Has Sanctioned A Private Right Of Action Under Title IX But Not Individual Compensatory Damages

An individual, such as Petitioner herein, was only granted the right to bring a private action to enforce Title IX in 1979. Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed. 2d 560 (1979). In that action, it was reasoned that the intended beneficiaries of Title IX funding would benefit from the correction of a violation, regardless of the status of the entity calling attention to the alleged violation. However, it is important to note that when the United States Supreme Court sanctioned a private right of action to enforce Title IX, no expansion of remedies under Title IX was similarly sanctioned.

Title IX provides remedies for its violation by an educational institution. The primary remedy is injunctive relief; the institution is enjoined from engaging in any offending or discriminatory conduct. If the injunctive remedy is not sufficient, then the next step is the withdrawal of federal funding from the non-complying institution. Guardians, supra, 463 U.S. at 598, 103 S.Ct. at 3230.

Petitioner would have these traditional Title IX remedies expanded to include compensatory damages to an individual alleging discrimination in violation of Title IX. Respondents counter by urging that the remedies provided

by Congress within the framework of Title IX are sufficient for the purposes of Title IX and that no expansion of these remedies is needed, nor desirable, in this setting. Money provided under Title IX is not geared to the individual but rather to all students of an institution, and it is required to be utilized for the benefit of all students without regard to gender. The expanded remedy sought by Petitioner herein would drain off monies meant for all students, and deposit that money in the pocket of an individual student. This result would be at odds with the original intent underlying Title IX.

C. The Legislative History of Title VI Confirms That Compensatory Damages Were Never Intended As A Remedy For Non-Compliance

The intent of Congress in passing the sex discrimination provision of Title IX must be traced to the purpose behind the passage of Title VI in 1964. In a summary of the 1972 Amendments, prepared by the Association of American Colleges and offered for print in the Congressional Record by Indiana Senator Birch Bayh on July 20, 1972, it is stipulated that the enforcement provisions of Title IX are identical to, and are patterned after, those of Title VI. As Title VI was the pioneer legislation to curb discrimination in an educational setting, it is naturally the source of the most informative Congressional dialogue concerning the enforcement of anti-discriminatory measures.

The record of the Senate debate that took place prior to the passage of Title VI is conspicuously devoid of any discussion, pro or con, regarding possible compensatory relief to a victim of discrimination at the hands of a recipient of federal funds. To the contrary, proponents of the Civil Rights legislation took pains to dissuade colleagues of the notion that Title VI was a vehicle for punishing an offender. Senator Hubert Humphrey of Minnesota said that "nothing was further from the truth" than the statement that Title VI was punitive or vindictive. 110 Cong. Rec., 6544 (1964). The purpose of Title VI, Senator Humphrey went on to say, was to insure that funds provided by the American people would not be used to support discrimination. Id., at 6544.

As a means to the end of putting a stop to discrimination, the only measure ever discussed -- and itself greatly debated -- was the cessation of funds to violators who refused to comply with federal requirements. Senator Humphrey called this "a last resort." Id. at 6544. The Legislative History of the Civil Rights Act states that this penalty would be used to enforce the only sanction offered by the bill - that of injunctive relief. Act of July 2, 1964, Publ. L. No. 88-352, 1964 V.S. Code Cong. and Admin. News, (78 STAT. 241).

Respondents contend that had the Congress intended to allow compensatory damages in a Title IX action, such would have been included in the legislation. The summary of the 1972 Amendments stipulated that the enforcement provisions

of Title IX were patterned after those of Title VI. The Congressional Record on both Title IX and the prior discussion on Title VI contains nothing on the issue. The only conclusion to be drawn is that compensatory relief was never meant to be a part of Title VI or Title IX. The Congressional Record reveals that an intense battle took place on the Senate floor over what measures could be used to enforce the anti-discrimination laws. If money damages had ever been seriously contemplated, it seems that the subject of such relief to a victim would have surfaced in those debates. The absence of such a discussion should, in itself, prohibit the practice of "creating" intent that was not present during Congressional debate. The expanded remedy sought by Petitioner herein is unauthorized, and should not be extended.

D. The Remedy Sought By Petitioner Is Unfair.

Respondents urge that the expansion of Title IX remedies to include compensatory damages to an individual is unfair for three reasons. First of all, as is noted above, this remedy diverts monies to an individual student when those monies are properly intended for the benefit of all students at an institution. Secondly, Petitioner's desired remedy assumes that the existing remedies provided by Title IX are insufficient. Congress did not specify compensatory damages to an individual but, rather, the remedies of injunctive relief and withholding of federal funding, as discussed above. These remedies have been satisfactory for over twenty-five years.

Thirdly, and perhaps most importantly, the remedy sought by Petitioner would subject the institution receiving funding under Title IX to potentially unlimited liability for a Title IX violation when the contractual nature of the arrangement with the federal government provides only limited funding to the institution to begin with. At a minimum, educational instiutions should not be burdened with this added liability without first having an opportunity to decline Title IX funding, and with it Title IX liability. Accordingly, the remedy sought by Petitioner herein seems unfair, unjustified, and in violation of the policy considerations underlying Title IX. Certiorari should be denied.

II. THE GUARDIANS DECISION DOES NOT SUPPORT PETITIONER'S POSITION BEFORE THIS COURT THAT A CASE ALLEGING INTENTIONAL DISCRIMINATION AUTOMATICALLY QUALIFIES FOR COMPENSATORY RELIEF.

Petitioner relies heavily on the U.S. Supreme Court case of Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed. 2d 866 (1983). The Guardians case was brought seeking relief under Title VI and Title VII. The fact that Petitioner can find no Title IX case to support her position, other than the recent Third Circuit decision of Pfeiffer v. Marion Center Area School District, et al., 917 F.2d 779 (3rd Cir. 1990) (hereinafter "Pfeiffer"), is in itself a comment on the precariousness of her position. Petitioner attempts to link

her Title IX analysis with the interpretation of Title VI in the Guardians decision, since both Titles emanate from Spending Clause legislation. Ironically, Petitioner later attempts to minimize the linkage of Title IX to Spending Clause legislation in her attempt to seek support from the Fourteenth Amendment.

Petitioner correctly asserts that Mr. Justice White, in his majority opinion in Guardians, concluded that compensatory relief is not available as a private remedy for Title VI violations not involving intentional discrimination. However, Petitioner falls into error in her position that Guardians stands for any mandate by the U.S. Supreme Court that compensatory relief is available to private individuals in cases of intentional discrimination. While the negative pregnant is clearly implied in Mr. Justice White's opinion, the Guardians decision never actually authorizes the compensatory relief sought by Petitioner herein, nor does Title IX's legislative history.

Respondents contend that perhaps Mr. Justice White was not certain himself on the issue of compensatory relief. Mr. Justice White wrote that "... it may be that the victim of intentional discrimination should be entitled to a compensatory award ..." (emphasis added) Guardians, supra 463 U.S. 582, at 598, 103 S.Ct. 3221, at 3230. Mr. Justice White himself was apparently not so confident that a private individual is clearly entitled to compensatory relief under the proper circumstances in a Spending Clause case. The Guardians decision is now almost eight years old, and only

the recent Pfeiffer decision from the Third Circuit is able to thread together the splintered majority decision in Guardians to support a finding of compensatory damages to an individual. At the same time, the Pfeiffer court expressed considerable doubt that Ms. Pfeiffer could prove any damages given the facts of her case. Pfeiffer makes no provision for the source of any compensatory damages if any are awarded to plaintiff. Furthermore, Pfeiffer is factually distinguishable from the case at bar, as will be discussed below at pp. 20-25 of this Brief.

The Guardians case was decided by a bare majority, and a fractured majority at that: four justices dissented from the majority opinion, and two justices out of the majority filed opinions concurring in the judgment but disagreeing with the holding. Mr. Justice Powell and Mr. Chief Justice Burger did not agree that private actions should be authorized, but did vote to affirm the Court of Appeals decision below. Private action to enforce Title IX was authorized by Cannon v. University of Chicago, supra, 441 U.S. 677 (1979) but the remedy of compensatory damages was not created. "Whether a litigant has a cause of action 'is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'" Guardians, 463 U.S. at 595, Mr. Justice White quoting from Davis v. Passman, 442 U.S. 228, 239, 99 S.Ct. 2264, 2274, 60 L.Ed. 2d 846 (1979).

In Guardians, Mr. Justice White clearly urged caution in the area of expanded remedies. He stated "[s]ince the

private cause of action ... is one implied by the judiciary rather than expressly created by Congress, we should respect the ... considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder." Guardians, 463 U.S. at 597, 103 S.Ct. at 3230.

Respondents here agree with the interpretation of Guardians provided by the Eleventh Circuit in its opinion in this case below:

> Although it seems clear that the judgment of Guardians Association precludes a cause of action for compensatory damages for unintentional discrimination, we believe the various opinions of a majority of the justices simply leaves open the question whether compensatory damages for intentional discrimination may be sought. We do not read Guardians Association to hold that because no damages may be sought for unintentional discrimination, this necessarily leads to the inevitable conclusion that where intentional discrimination is shown, a damages remedy is possible. The question is simply open, and thus the inferior courts are free, checked only by the constraints within their respective spheres of authority, to act as they deem appropriate. Franklin, 911 F.2d 617, at 625 (11th Cir. 1990) (emphasis supplied by the Court).

An issue that is "open" does not mandate an expansion of the remedies provided within the body of Title IX. Guardians does not authorize compensatory damages to an individual seeking relief under Title VI, nor by extension Title IX. Ms. Franklin's Petition for Writ of Certiorari should be denied.

III. THE PERCEIVED SPLIT OF AUTHORITY BETWEEN THE CIRCUITS IS NOT MATURE FOR CONSIDERATION BY THE U.S. SUPREME COURT

Petitioner contends that there is a split of authority between the circuits due to the recent Third Circuit decision in the case of Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Area, et al., 917 F.2d 779 (3rd Cir. 1990). In fact, the Pfeiffer case stands in stark contrast to other decisions concerning Title IX, as the Pfeiffer opinion admits in its body. In essence, the Third Circuit in Pfeiffer has assumed a minority position in its interpretation of Guardians. The Pfeiffer court admits that the Guardians decision is fragmented and that the court reached its decision "not without some difficulty."

The Pfeiffer court went on in its decision to admit that its opinion was at odds with those from the Eleventh Circuit and the Seventh Circuit concerning Title IX. The Seventh Circuit has long declined to recognize any litigant's attempt to allow compensatory damages for an action under Title IX. Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (on certiorari from the Seventh Circuit); Cannon v. University of Chicago, 710 F.2d 351 (7th Cir. 1983); Accord, Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), cert. den'd 463 U.S. 602, 102 S.Ct. 1993, 72 L.Ed. 2d 456 (1982). The Fifth and Eleventh Circuits have also declined to recognize compensatory damages as a remedy owed to an individual for violations of

Title VI or Title IX. Drayden v. Needville Independent School District, 642 F.2d 129 (5th Cir. 1981), adopted as precedent upon the creation of the Eleventh Circuit by its declaration in the case of Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981); Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990).

In fact, the Pfeiffer court would appear to be at odds with the reasoning of the U.S. Supreme Court in its consideration of the case of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed. 2d 694 (1981). Title IX, like Title VI, is considered part of the legislation enacted by Congress pursuant to the Spending Clause. Guardians, supra, 463 U.S. at 598, 103 S.Ct. at 3230 (opinion of White, J.). In such a case, the U.S. Supreme Court has not required a defendant to "provide money to plaintiffs, much less require [a defendant] to take on ... open ended and potentially burdensome obligations ..." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, at 29, 101 S.Ct. 1531, at 1546, 67 L.Ed. 2d 694 (1981).

The Pfeiffer court's analysis fails to take up the important issue of just where compensatory damages for this plaintiff would originate. In fact, a superficial reading of the Pfeiffer decision indicates that the Third Circuit has considerable doubt that Ms. Pfeiffer will be able to prove any compensatory damages, even though the Third Circuit has determined that she is entitled to same in this Title IX setting. The impact of the Third Circuit decision in Pfeiffer is unclear,

and for that reason, Respondents submit that there may in fact be no split of authority between the circuits at this point in time. It may well be premature for the Supreme Court to take up this issue, particularly within the context of a factually distinguishable case from a circuit other than the Third. In all honesty, Respondents herein would prefer not to be forced to bear the expense of litigation before the Supreme Court in order to correct a novel ruling from a foreign circuit.

The Pfeiffer decision is also clearly distinguishable from the case at bar on the basis of the facts alone. Plaintiff Arlene Pfeiffer was dismissed from her high school chapter of the National Honor Society because of premarital sexual activity, considered by her chapter to be inconsistent with the standards of leadership, character and moral conduct required for membership. There can be no question that the action taken against Ms. Pfeiffer was intentional. The faculty council of her high school chapter held a meeting and invited her to attend. Ms. Pfeiffer was questioned as to whether her pregnancy had been voluntary, and she replied in the affirmative. Within five days' time, she had been dismissed from the Society. If these actions by her chapter constituted discrimination, and the court clearly concluded that they did, there can be no question but that this discrimination was intentional. Ms. Pfeiffer was singled out by name and individually dismissed.

In contrast, the facts of the case at bar do not indicate that Respondents herein made any act or omission as

pertaining to Petitioner Christine Franklin until such time as she herself reported to a faculty member that she had been coerced into having sexual relations with a male teacher. The facts of Petitioner's case below clearly indicate that no member of the Respondent School District had knowledge of this impermissible activity until Ms. Franklin herself made the disclosure. At that point in time, a prompt investigation was undertaken. The violations of Title IX delineated by the Office for Civil Rights in its investigation of Petitioner's case were of a general nature; the Respondent School District was found not to have in place a procedure whereby complaints for Title IX could be made and processed. This "discrimination" could hardly be characterized as intentional as to Petitioner Christine Franklin. The violation of Title IX as perceived by OCR was a technical one, and clearly impacted all students at the school, not just Petitioner. Furthermore, as the OCR Report indicates, the School District came into compliance with Title IX prior to Petitioner's initiation of her federal court action.

As the Pfeiffer case is clearly distinguishable on its facts from the case at bar, the interpretation of Title IX contained in Pfeiffer is similarly distinguishable from the case. The Pfeiffer decision does not represent a split of authority between the circuits so as to merit a grant of certiorari here.

IV. THE FACTS OF THIS CASE DEMONSTRATE THAT THERE HAS BEEN NO INTENTIONAL DISCRIMINATION BY RESPONDENTS

Respondents have contended throughout this brief that the decision of the U.S. Supreme Court in Guardians Association v. Civil Service Commission, et al., supra, 463 U.S. 582 (1983) does not authorize the expansion of compensatory damages to an individual such as Petitioner herein. Respondents do not agree with Petitioner's interpretation of the Guardians decision. However, assuming arguendo that the Guardians decision does authorize compensatory damages to an individual in a case of intentional discrimination, Respondents respectfully show this Court that the facts of the case at bar do not constitute intentional discrimination, such that this case would not qualify for the Petitioner's interpretation of the Guardians decision. Accordingly, Petitioner's Application for Writ of Certiorari should be denied.

The facts of this case, when reduced to their essence, involve a female high school student who alleges that she was sexually harassed by an individual faculty member from whom she had taken one economics class the year before. Petitioner contends that she engaged in sexual intercourse with this faculty member on three occasions, each time willingly, although she does allege that she was somewhat intimidated and coerced into the separate acts of sexual intercourse. There is no allegation that this faculty member had any position of authority with the Respondent School

District beyond that of a mere teacher. More importantly, there is no allegation that the Respondents had any direct knowledge of the alleged sexual relationship between Petitioner and this teacher until Petitioner herself communicated her story to one of her female teachers. This female teacher immediately notified the school guidance counselor, who in turn set in motion a prompt and complete investigation of the allegations made by Petitioner.

Petitioner does allege that the high school administrators knew or should have known of certain sexually harassing conduct by the offending male teacher, but the basis of this "knowledge" consists of vague comments made by other students, not Petitioner herein, and none of the comments from other students specifically identified any sexual relationship between the male teacher and Petitioner. Simply put, there is no factual allegation of any act or omission on the part of Respondents herein which could be even arguably identified as intentional discrimination against Petitioner.

Respondent's violation of Title IX consisted essentially of a failure to have in place a procedure whereby students could report alleged violations of Title IX. This "failing" impacted male and female students alike, so no intentional discrimination can be alleged by Petitioner against Respondents herein. Only the individual teacher could be said to have intentionally acted toward Petitioner, and Mr. Hill is not a party to the case at bar. There is no suggestion, much less any allegation, that the individual teacher acted

within the scope of his teaching duties when he allegedly had sex with Petitioner. Similarly, there is no allegation that Respondents knew of any sexual relationship whatsoever between the teacher and Petitioner until the Petitioner divulged the information to another faculty member. Once the Respondent School District knew of the allegations, a prompt and thorough investigation took place. Petitioner was treated no differently by Respondent than would any other student, male or female. Certiorari should be denied.

V. TITLE IX DOES NOT AUTHORIZE ACTIONS AGAINST AN INDIVIDUAL SUCH AS DR. PRESCOTT.

Petitioner filed suit against Dr. William Prescott as an individual in the district court below, claiming that Dr. Prescott violated Title IX in his dealings with Petitioner. Dr. Prescott is identified as a party to this action by Petitioner in her Application for Writ of Certiorari, but she does not include any of her arguments to the trial court below in her Brief to this Court. Respondents contend that this is an acknowledgement by Petitioner that she has no valid cause of action under Title IX as to Dr. Prescott.

Title IX does not authorize a right of action against an individual employee of an educational institution. Leake v. University of Cincinnati, 605 F.2d 255, 259 (5) (6th Cir. 1979); Accord, Romeo Community Schools v. H.E.W., et al., 600 F.2d 581 (6th Cir. 1979). The district court was correct in

dismissing the Petitioner's case against Dr. Prescott. Petitioner essentially conceded this fact in that she declined to discuss this issue in her appellate brief to the Eleventh Circuit. The Eleventh Circuit considered this particular issue to have been abandoned by Petitioner. Franklin v. Gwinnett County Schools, et al., 911 F.2d 617, at 628 (11th Cir. 1990). Petitioner's Application for Certiorari should be denied as to this issue as well.

VI. CONCLUSION

Ms. Franklin's Petition for Writ of Certiorari should be DENIED. Title IX does not countenance the remedy of compensatory damages to an individual, and Petitioner's arguments are unpersuasive that an expansion of remedies should be created here. The Third Circuit decision which is apparently at odds with the opinion of the Eleventh Circuit in this case, is not mature at this time for consideration by the Supreme Court as a split among the Circuits. The Third Circuit decision is also factually distinguishable from the case at bar, as Petitioner cannot demonstrate the intentional discrimination that her argument requires. The opinion of the Eleventh Circuit in this case should not be disturbed.

Respectfully submitted, this 11th day of January, 1991.

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All above counsel have been duly admitted to the Supreme Court for the State of Georgia, the highest Court of Record in this state.

IN THE Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN, PETITIONER

v.

GWINNETT COUNTY SCHOOL DISTRICT AND
WILLIAM PRESCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a private party may recover compensatory damages for an allegedly intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-918

CHRISTINE FRANKLIN, PETITIONER

v.

GWINNETT COUNTY SCHOOL DISTRICT AND
WILLIAM PRESCOTT

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether the federal judiciary should imply a private right of action to recover compensatory legal damages for an allegedly intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The United States has a substantial interest in the scope of any implied private remedies available under Title IX. Because the subject of any private action under Title IX is a program receiving federal funding, the United States has a strong interest in assuring that private remedies do not unduly interfere with such programs. The government also has an important interest in assuring that any implied remedies conferred by the courts on private parties are consistent with the enforcement program administered by the Department of Education pursuant to Section 902 of the Act, 20 U.S.C. 1682.

In response to an order inviting the Solicitor General to submit a brief expressing the views of the United States, we filed a brief suggesting that the Court grant further review.

STATEMENT

1. From 1986 to 1988, petitioner Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia. During that period, respondent Gwinnett County School District, which operates North Gwinnett High School, received federal financial assistance.

Petitioner's complaint alleges that a former teacher at North Gwinnett High School, Andrew Hill, subjected her to a series of sexual advances culminating in several instances of intercourse. According to the complaint, other teachers and school authorities became aware of Hill's sexual approaches to petitioner and other female students, but failed to respond. In February 1988, petitioner told the school's guidance counselor of Hill's actions, and the guidance counselor in turn advised the principal. The complaint alleges that after the principal initiated an investigation, respondent William Prescott urged petitioner to drop the matter. The school district closed the investigation when Hill resigned.[1]

On the basis of Hill's activity and other officials' failure to take action against him, Count I alleges that the school district intentionally violated Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Compl. ¶¶ 39-50. Count II alleges that Hill and Prescott "wilfully and intentionally violated [Title IX] by using their position of authority to force [petitioner] to drop the investigation" and that "[b]y failing to reprimand

[1] Compl. ¶¶ 8-14, 17, 19-27, 29-31, 33-35, 37. Because the courts below dismissed the action on the basis of the complaint, its allegations must be taken as true. *Conley* v. *Gibson*, 355 U.S. 41 (1957). We lodged copies of the original complaint and an amendment to the complaint (which attaches a report by the Department of Education on the results of its investigation) with the brief that we filed at the petition stage.

or otherwise discipline Dr. Prescott, [the school district] * * * condoned and ratified the conduct of Dr. Prescott and is responsible therefor." *Id.* ¶¶ 55-56. Both counts seek compensatory damages from the school district. *Id.* ¶¶ 51, 57.[2]

2. The district court granted respondents' motion to dismiss the action for failure to state a claim. Pet. App. 15-21. Noting "that the only real issue * * * is whether compensatory relief is available under Title IX," *id.* at 17, the court concluded that a Fifth Circuit decision, *Drayden* v. *Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981), foreclosed that type of relief. Pet. App. 17, 18-19. The district court explained that *Drayden*'s holding—that the "private right of action allowed under Title VI [of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*] encompasses no more than an attempt to have any discriminatory activity ceased," 642 F.2d at 133—was also controlling with respect to Title IX.

3. The court of appeals affirmed. Pet. App. 1-14. The court noted that although it was "undisputed that an implied private right of action exists under Title IX," "the existence of a cause of action by no means assures a right to an unlimited array of remedies." Pet. App. 5-6. Like the district court, the court of appeals found that *Drayden* was "binding precedent" on the availability of damages under Title IX and that *Drayden* had not been overruled by *Guardians Ass'n* v. *Civil Service Commission*, 463 U.S. 582 (1983). Although *Guardians Ass'n*

[2] Petitioner has dropped her claim against respondent Prescott. Pet. Br. 2 n.1. The complaint also sought injunctive relief and punitive damages; those claims were abandoned in the district court and are not before this Court. See Pet. i; Pet. App. 17.

Before commencing this action, petitioner filed a complaint with the Office for Civil Rights ("OCR") of the United States Department of Education. After an investigation, OCR concluded that the school district had violated Title IX in several respects. Amended Compl., Ex. A, at 1, 7-8. Based upon the district's assurances that it would take action to correct the violations, however, OCR also determined that the district was "presently fulfilling its obligations with respect to Title IX" and closed the investigation. *Id.* at 1, 8.

"precludes a cause of action for compensatory damages for *unintentional* discrimination," the court of appeals explained, "the various opinions of a majority of the Justices simply leave[] *open* the question whether compensatory damages for intentional discrimination may be sought." Pet. App. 9.

On that question, the court found "important guidance" in Justice White's opinion in *Guardians Ass'n*, which suggested that only limited remedies should be implied for violations of statutes enacted pursuant to the Spending Clause. Pet. App. 9-10. Ruling that Title IX is Spending Clause legislation, the court stated that it would "proceed with extreme care when * * * asked to find a right to compensatory relief, where Congress has not expressly provided such a remedy as part of the statutory scheme, where the Supreme Court has not spoken clearly, and where binding precedent in this circuit is contrary." *Id.* at 11. The court of appeals concluded that "[b]ecause * * * the Supreme Court has not overruled *Drayden* either explicitly or implicitly," it was "bound to follow *Drayden*'s mandate that damages are unavailable under Title VI and IX." Pet. App. 12.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). Consequently, the power to create remedies for violations of federal statutes rests exclusively with Congress. In our view, Congress should be deemed to exercise that power only when it acts in the manner the Constitution prescribes, by passing a law that is presented to the President for approval. *INS* v. *Chadha*, 462 U.S. 919, 944-951 (1983). The role of the courts with respect to statutory remedies, in turn, should be the same as with respect to any other issue of statu-

[3] Judge Johnson concurred specially. He would have based the decision exclusively on *Drayden*. Pet. App. 13-14.

tory construction. Courts should restrict themselves to determining whether the language of the statute authorizes the remedy sought by a plaintiff, employing techniques of statutory interpretation to clarify any ambiguity in the text. "[I]mplying a private right of action on the basis of congressional silence is a hazardous exercise, at best." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979).

On occasion, however, this Court has recognized implied remedies in statutes that do not expressly provide them. In one such case, *Cannon* v. *University of Chicago*, 441 U.S. 677, 717 (1979), the Court held that a private plaintiff could maintain an action under Title IX "despite the absence of any express authorization for it in the statute." This case presents a question not decided in *Cannon* or in any of this Court's subsequent decisions—whether a private plaintiff may recover compensatory legal damages for a violation of Title IX.

I. The judiciary may not award damages under Title IX in the absence of an affirmative showing that Congress authorized that form of relief. Unless a congressional intention to provide a remedy "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Karahalios* v. *National Fed'n of Federal Employees*, 489 U.S. 527, 532-533 (1989). That fundamental principle is applicable to each form of relief sought under a statute and to any extension of a previously recognized implied right of action.

The requirement of an affirmative showing of intent to confer a given remedy is grounded in limitations on the authority exercised by federal courts and in the realities of the modern legislative process. With respect to statutory remedies, "the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 95. Consequently, courts lack power to afford relief pursuant to a remedy that Congress has not author-

ized. Moreover, in view of the care with which Congress has fashioned statutory remedies in recent decades, there is no empirical basis for a free-floating presumption that the enactment of a statutory prohibition embodies a broad delegation to the courts to fashion whatever remedies they—as opposed to Congress—may consider appropriate. Any resort to such a presumption necessarily displaces political choices embedded in federal statutes.

II. None of the materials customarily employed in statutory interpretation—or in this Court's implied right of action cases—discloses an intention to allow private plaintiffs to recover damages for violations of Title IX. Title IX does not by its terms authorize the pursuit of *any* private remedies, and the form of its statutory prohibition is fully consistent with limiting awards to equitable relief. The legislative history reflects no expectation that damages would be available. There are indications that members of the 1972 Congress expected enforcement of Title IX to follow the form of Title VI of the Civil Rights Act of 1964, but private parties had not recovered damages under Title VI prior to 1972. Indeed, recognition of a damages remedy would contradict the legislative history of Title VI and other Titles of the Civil Rights Act of 1964.

Contrary to petitioner's contention, regulations promulgated pursuant to Title IX do not recognize a damages remedy in private actions. The regulation on which petitioner relies speaks only to the measures that may be imposed by the *agency*, not to relief recoverable in a private action, and the agency has not sought payment of compensatory damages in its enforcement of the statute. In any event, it is hardly unusual for enforcement schemes to confer greater remedial authority on governmental authorities than on private parties. None of the other grounds advanced by petitioner or her *amici*—the historical context of Title IX, subsequent enactments, or considerations regarding the relative wisdom of various possible remedies—justifies judicial implication of a damages remedy not set forth in the statute itself.

ARGUMENT

I. AN AFFIRMATIVE DEMONSTRATION OF CONGRESSIONAL INTENT IS REQUIRED FOR RECOGNITION OF AN IMPLIED DAMAGES REMEDY UNDER TITLE IX

In *Cannon*, an applicant for medical school who alleged that her applications had been rejected because of her sex brought an action under Title IX seeking declaratory, injunctive, and monetary relief.[4] Reversing the dismissal of the complaint, this Court held that the plaintiff was entitled to "maintain her lawsuit, despite the absence of any express authorization for it in the statute." 441 U.S. at 717. The Court did not consider, however, what forms of relief might be available in the newly-recognized action.

No subsequent decision of this Court has resolved the question whether a plaintiff may recover compensatory legal damages for a violation of Title IX or other similar statutes prohibiting discrimination in federally funded programs. In *Guardians Ass'n*, *supra*, a sharply divided Court upheld a judgment denying retrospective equitable relief for an unintentional violation of Title VI. In *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 630 (1984), the Court found that Section 504 of the Rehabilitation Act, 29 U.S.C. 794, "authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay," but reserved the question of "the extent to which money damages are available." 465 U.S. at 630. See also *Smith* v. *Robinson*, 468 U.S. 992, 1020 n.24 (1984).[5]

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[4] See *Cannon* v. *University of Chicago*, 406 F. Supp. 1257, 1258 (N.D. Ill. 1976).

[5] Contrary to petitioner's suggestion (Pet. Br. 28-29), there is a well-established distinction between money damages and equitable decrees requiring the payment of money. This Court has "long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order provid-

A. As many recent decisions make clear, the question whether Title IX gives rise to an implied right of action to recover damages is "basically a matter of statutory construction." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979). Accord, *e.g.*, *Karahalios* v. *National Fed'n of Federal Employees*, 489 U.S. at 532-533; *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804, 812 n.9 (1986). An affirmative demonstration of Congress's intent to confer a statutory remedy is required. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U.S. 287, 297 (1981). "Unless such 'congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" *Karahalios*, 489 U.S. at 532-533 (quoting *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988)).

The Court has applied that fundamental principle to each separate form of relief, see, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, and to any "extension or expansion" of a recognized right of action, *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2763 (1991). It is rooted both in the constitutional limits on the lawmaking authority of federal courts and in the realities of the modern legislative process.

1. "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 95. Except in certain areas, such as admiralty and maritime jurisdiction, the Constitution does not contemplate that federal

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ing for the reinstatement of an employee with back pay, or for 'the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988). There is no dispute that the relief petitioner seeks falls exclusively within the first category. All references to "damages" in this brief are to the compensatory legal damages described in *Bowen*.

courts will fashion substantive rules of decision, including those that determine the availability of remedies. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-646 (1981); *Northwest Airlines, Inc.*, 451 U.S. at 95-98. With respect to statutory remedies, "the federal lawmaking power is vested in the legislative, not the judicial, branch of government," and the courts are "subject to the paramount authority of Congress." *Id.* at 95. Therefore, the judiciary must identify "some congressional authorization to formulate substantive rules of decision," including those governing the availability of remedies. See *Texas Industries, Inc.*, 451 U.S. at 641.

2. Even apart from the issue of power, the realities of the modern legislative process support the principle that an affirmative showing of congressional intent is required for recognition of a statutory remedy. For decades at least, Congress has devoted great care to the remedies it has provided for statutory violations. Federal statutes provide for various combinations of private and governmental remedies; voluntary conciliation and administrative and judicial proceedings; and many forms of relief—including injunctions, other equitable relief, limited monetary damages (or double and treble damages), and attorneys fees. For many years, there has been no empirical justification for a presumption that Congress intends to provide a full array of remedies for any statutory violation. "The increased complexity of federal legislation and the increased volume of federal litigation" warrant "more careful scrutiny of legislative intent." See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-377 (1982).

Moreover, the selection of statutory remedies involves inherently political choices. Congress never provides for enforcement of a statute at any cost. Rather, it chooses remedies that will strike a balance between the goals the statute is designed to advance and other competing values. Such remedial choices are potentially as contentious as questions concerning the substantive provisions of a statute. Individual members of Congress regularly disagree over whether a given remedy is necessary for effective

enforcement (or, conversely, whether it will result in unduly burdensome enforcement). The remedies provided by a particular statute frequently reflect compromises encompassing both the substantive and remedial provisions of a statute. See *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) ("Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises."). It is not uncommon for proponents of broad remedies—including those who express their position in debates during the legislative process—to make concessions in order to facilitate legislation that might otherwise fail of passage.

In short, the question of what type of relief to afford for a violation of a substantive legal standard—injunctive, compensatory, penal; at the behest of the government or private parties—is no less a legislative policy judgment than the question of what the legal standard should be, and the policy judgments are closely interrelated. Congress might well decide that one standard is appropriate if enforcement is limited to government injunctive proceedings, while a different standard would be appropriate if private parties may sue for full compensatory damages. The question of what type of relief is available under a statute should therefore be subject to the same canons of construction as the question whether there exists a private cause of action at all. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 98 & n.41. Any resort to a presumption that a statute prohibiting certain conduct necessarily empowers courts to fashion whatever remedies they may deem appropriate necessarily involves the unelected judiciary in displacing political choices embodied in the statute.

B. Although petitioner appears to concede that an affirmative demonstration of congressional intent is required for recognition of a "private right of action," she argues that a diametrically different approach applies to the question of "remedies." Pet. Br. 6, 10, 14, 15. In her view, once it is established that a statute provides a "right of action," Congress is presumed to intend "all appropriate, traditional forms of judicial relief, unless it indicates otherwise." *Id.* at 11. This "in for a penny, in for a pound" approach is inconsistent with the proper role of the federal courts in our constitutional system and finds no support in this Court's more recent precedents.

1. In the context of statutory remedies, this Court has abandoned the analytical approach on which petitioner relies. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 374-378. As petitioner correctly notes, there were several cases in which this Court regarded an express grant of subject matter jurisdiction as a broad delegation of remedial discretion. The jurisdictional grant was said to provide "a general right to sue for [an invasion of federal rights]," and to empower the courts to "use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).[6] However, in the statutory context, this Court has rejected the proposition "that * * * when the federal courts have jurisdiction to hear a case, they generally are *not* restricted in their ability to afford full relief" (Pet. Br. 15).

It is now clear that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law," including statutory remedies not authorized by Congress. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. at 640-641. Indeed, in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 577, the Court specifically rejected a contention that an express grant of federal jurisdiction in the Securities Exchange Act of 1934 authorized the courts to award private remedies under the Act:

> Section 27 [of the 1934 Act, 15 U.S.C. 78aa] grants jurisdiction to the federal courts and provides for

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[6] See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239-240 (1969).

venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision.

Nothing in *Guardians Ass'n* or *Darrone* breathed new life into petitioner's position. See Pet. Br. 13-14. In *Guardians Ass'n*, the holding of the Court conferred no relief on the plaintiffs; in *Darrone*, the Court reserved the question at issue here. 465 U.S. at 630.[7] Moreover, Title IX itself grants no subject matter jurisdiction over private actions, nor do its "substantive provisions" include "a general right to sue" for a violation of Section 901.[8] Whatever the merits of "implying" rights of

[7] In the context of constitutional violations, the Court has continued to regard the statutory grant of general federal question jurisdiction, 28 U.S.C. 1331, as a source of "authority to choose among available judicial remedies in order to vindicate constitutional rights." *Bush* v. *Lucas*, 462 U.S. 367, 374 (1983). See *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979); *Carlson* v. *Green*, 446 U.S. 14, 18 (1980). However, in *Davis* v. *Passman*, *supra*, and *Touche Ross & Co.* v. *Redington*, *supra*, this Court effectively restricted this principle to constitutional actions. See 442 U.S. at 241 ("the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution"); 442 U.S. at 577 (limiting *J.I. Case Co.* v. *Borak*, *supra*, and holding that a statutory remedy "must be found, if at all, in the substantive provisions of" the statute giving rise to the remedy). It should come as no surprise that the scope of judicial authority is broader with respect to the Constitution than it is in construing statutes. For these reasons, contrary to petitioner's position (Pet. Br. 14), *Davis* v. *Passman*—which involved the implication of a cause of action under the Fifth Amendment—is inapplicable to this case.

[8] By contrast, 42 U.S.C. 1983 makes persons who violate certain rights under color of state law "liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress." In *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978), the Court determined that the damage awards expressly authorized by Section 1983 should be calculated to provide compensation for actual injuries. Nothing in *Carey* bears on the question here—which is what relief is available in the face of congressional silence. See Pet. Br. 12, 19.

action may be, there is no justification for treating silence as the equivalent of the broadest imaginable grant of remedial authority. Yet that is the gist of petitioner's position.

Consistent with the Court's focus on congressional intent, the relevant question is whether Congress has authorized the plaintiff to recover a particular form of relief. The nature of the pertinent inquiry is manifest in those cases in which the Court has been called upon to determine whether a plaintiff may recover more than one form of relief. In those cases, the Court has separately analyzed the question whether Congress intended to confer each remedy sought. The Court has not proceeded in the manner suggested by petitioner—*i.e.*, determining whether a "right of action" exists and then applying a presumption in favor of all forms of relief.

In *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals had held that a plaintiff could recover both damages and injunctive relief under a statute prohibiting corporate campaign contributions. This Court addressed each form of relief separately. It held, based upon recent amendments to the statute, that the plaintiff was limited to an express statutory procedure for injunctive relief. *Id.* at 77. The Court then employed its familiar four-factor analysis to determine whether damages were available. The Court held that "*such relief* is not available with regard to a 1972 violation under [the statute] itself," *id.* at 77-78 (emphasis added), reasoning that "implication of a federal right *of damages* on behalf of a corporation under [the statute] would intrude into an area traditionally committed to state law without aiding the main purpose of [the statute]," *id.* at 85 (emphasis added).

Similarly, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15-16, a case brought under the Investment Advisors Act of 1940, the Court stated that

"what must ultimately be determined is whether Congress intended to create the private remedy asserted." The Court held that the language of Section 215 of the Act "fairly implies a right to specific and limited relief in a federal court," 444 U.S. at 18—the right to bring an action for recission and restitution—noting that "the federal courts in general have viewed such language as implying *an equitable cause of action for rescission or similar relief*," *id.* at 19 (emphasis added). The Court did not simply conclude that there was a private cause of action, with all traditional remedies. And the Court went on to rule that "the Act confers no other private causes of action, legal or equitable," *id.* at 24, rejecting the claim that Section 206 of the Act affords a private cause of action for damages. The Court declined to adopt the dissent's suggestion—indistinguishable from petitioner's position—that "[o]nce it is recognized that a statute creates an implied right of action, courts have wide discretion in fashioning available relief." *Id.* at 30 (White, J., dissenting). Instead, the Court looked at the specific remedy being sought, and asked whether *Congress* authorized that particular form of relief. In other decisions, the Court has indicated that the pertinent issue is whether Congress intended to authorize a particular form of relief, rather than a "private right of action" in the abstract.[9]

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[9] *E.g., Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 413-414 (1975) ("The question presented by this case is whether such customers have an implied private right of action under the Securities Investor Protection Act of 1970 * * * to compel the SIPC to exercise its statutory authority for their benefit."); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 374 (describing the question presented as "whether respondents may assert an implied cause of action for damages"); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 136 (1985) ("The question presented for decision is whether, under the Employee Retirement Income Security Act of 74 (ERISA), a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims.").

2. Remarkably, petitioner also suggests (Pet. Br. 15) that her presumption would reduce "the law's uncertainty" and actually deny courts "the kind of legislative authority that they are ill-suited to exercise." Precisely the reverse is true. Application of a presumption in favor of judicial implication of a full range of remedies would not serve to diminish *ad hoc* consideration of Congress's intent, since such a presumption would still require courts to examine whether Congress intended to withhold a particular form of relief.

To the extent that the presumption resulted in recognition of additional damages remedies, judicial exercise of legislative authority would increase. Courts would be called upon, in the case of each right of action, to resolve such collateral issues as statutes of limitations, applicable standards of proof and causation, the availability of *respondeat superior* liability, the necessity for exhaustion of administrative remedies, the relation between the implied remedy and express statutory remedies, and a host of other questions.[10] Undoubtedly, the availability of implied rights of action has given rise to uncertainty.[11]

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[10] See, *e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991) (statute of limitations); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. at 2763 (causation requirement); *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701 (1989) (*respondeat superior* liability vis-a-vis state actors and relation with express remedies); *Carlson* v. *Green*, 446 U.S. 14, 23-24 (1980) (survival of action upon plaintiff's death); *McCarthy* v. *Maddigan*, No. 90-6861 (presenting the question whether a prisoner must exhaust administrative remedies before commencing a *Bivens* action). When it enacts express remedies, Congress often supplies answers to those questions.

[11] See, *e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991) ("In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed."); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. at 2763 (noting that causation requirement for an implied right of action is difficult to define, "for we can find no manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as respondents' theory of causation would entail").

But responding to that problem with petitioner's across-the-board presumption in favor of implied remedies would be using gasoline to extinguish a fire.

II. NONE OF THE MATERIALS ON WHICH AN IMPLIED RIGHT OF ACTION MAY BE BASED DISCLOSE A CONGRESSIONAL INTENTION TO AUTHORIZE AN AWARD OF DAMAGES FOR A VIOLATION OF TITLE IX

As noted, it is our position that the Congress and the courts occupy the same roles with respect to statutory remedies as they do with respect to any other "matter of statutory construction," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15. Because Congress exercises its power to make law only by enacting a statute that is presented to the President, the question whether it has enacted a remedy should be resolved by reference to the statute. *Thompson* v. *Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment). Techniques of statutory interpretation should be employed to clarify any ambiguity in the enactment, not to discern congressional intent apart from it.

We recognize, of course, that not all of this Court's decisions have conformed to that model. For instance, in *Cannon*, 441 U.S. at 717, the Court implied a cause of action "despite the absence of any express authorization for it in the statute." But in any event, none of the materials on which this Court has relied in implying statutory rights of action—including those invoked in *Cannon*—provides support for a damages remedy under Title IX. To the contrary, all indications are that Congress did not contemplate that damages would be available for violations of Title IX.

A. The Statutory Language

The language of Title IX is silent on the nature of the relief that may be awarded to private parties. This is hardly surprising, since the statute is silent on the very existence of a private cause of action in the first place. Mindful of the interpretive difficulties occasioned by

fleshing out a non-existent statutory provision, see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. at 2780, we believe that the statute is not framed in terms suggesting that awards of damages are essential for effective enforcement. On its face, Title IX prohibits three forms of discrimination in federally funded educational programs: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any such program. 20 U.S.C. 1681(a). It is entirely consistent with this language to limit the implied remedies available to a private party to those necessary (1) to restore a plaintiff who has been wrongfully excluded from a federally assisted program to full participation, (2) to reverse any denial of benefits and to restore any benefits wrongfully withheld, and (3) to eliminate unlawful discrimination.

To be sure, in *Cannon*, 441 U.S. at 690-691, this Court placed great emphasis on the form of Title IX's prohibition on discrimination, emphasizing that it "expressly identifies the class Congress intended to benefit" and has "an unmistakable focus on the benefited class." This Court has since indicated, however, that language identifying a protected class is insufficient, in and of itself, to support a damages remedy. In *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. at 16-17, the Court noted that two provisions of the Investment Company Act, one of which prohibited frauds or deceits "upon any client or prospective client" of an investment adviser, "were intended to benefit the clients of investment advisers." Nevertheless, the Court continued, "whether Congress intended additionally that these provisions would be enforced through private litigation is a different question," *id.* at 18, and it declined to recognize an implied right of action for damages. See also *id.* at 24.

B. The Legislative History

Petitioner and her *amici* have failed to identify even a single reference in Title IX's legislative history to the possibility of an award of damages to a private plaintiff.

We are unaware of any legislative history supporting recognition of such a remedy. Indeed, all of the pertinent materials—including those on which the Court relied in *Cannon*—are consistent only with the conclusion that Congress did not contemplate awards of damages for violations of Title IX.

1. a. In *Cannon*, this Court found that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years," 441 U.S. at 696, and reasoned, accordingly, that prior court decisions "reflect[ed] [Congress's] intent with respect to Title IX," *id.* at 697-698.[12] Significantly, in none of the cases to which the Court referred did the court sustain an award of damages for a violation of Title VI.[13] *Rolfe* v. *County Bd. of Ed.*, 282 F. Supp. 192

[12] This Court summarized the course of events that culminated in the enactment of Title IX in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 523-530 (1982).

[13] See *Gautreaux* v. *Romney*, 448 F.2d 731, 740-741 (7th Cir. 1971), later appeal, *Gautreaux* v. *Chicago Housing Auth.*, 503 F.2d 930 (7th Cir. 1974), aff'd *sub nom. Hills* v. *Gautreaux*, 425 U.S. 284 (1976) (authorizing injunctive relief for housing discrimination); *Alvarado* v. *El Paso Indep. School Dist.*, 445 F.2d 1011 (5th Cir. 1971) (reversing dismissal of school desegregation suit without addressing appropriate relief); *Gautreaux* v. *Chicago Housing Auth.*, 436 F.2d 306 (7th Cir. 1970) (upholding injunctive relief), cert. denied, 402 U.S. 922 (1971); *Shannon* v. *HUD*, 436 F.2d 809, 822-823 (3d Cir. 1970) (authorizing declaratory and injunctive relief regarding location of a public housing project); *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967) (affirming denial of preliminary injunction against highway construction project), cert. denied, 390 U.S. 921 (1968); *Anderson* v. *San Francisco Unified School Dist.*, 357 F. Supp. 248, 255 (N.D. Cal. 1972) (awarding injunctive and declaratory relief to remedy "reverse discrimination" in employment); *Blackshear Residents Org.* v. *Housing Auth.*, 347 F. Supp. 1138, 1149-1150 (W.D. Tex. 1972) (awarding injunctive relief directed at segregated public housing); *Hawthorne* v. *Kenbridge Recreation Ass'n*, 341 F. Supp. 1382 (E.D. Va. 1972) (awarding injunctive relief directed at discrimination by private association receiving SBA loan); *Southern Christian Leadership Conference, Inc.* v. *Connolly*, 331 F. Supp. 940 (E.D. Mich. 1971) (denying motion to dismiss action for declaratory relief

(E.D. Tenn. 1966), aff'd, 391 F.2d 77 (6th Cir. 1968), which received only a "see also" citation in *Cannon*, 441 U.S. at 697 n.21, is no exception.[14] Thus, if the Congress that enacted Title IX was guided by the "state of the law at the time the legislation was enacted," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at

regarding discrimination in SBA loan program); *Hicks* v. *Weaver*, 302 F. Supp. 619 (E.D. La. 1969) (granting preliminary injunction); *Gautreaux* v. *Chicago Housing Auth.*, 296 F. Supp. 907, 914-915 (N.D. Ill. 1969) (granting injunctive relief directed at segregated housing); *Rolfe* v. *County Bd. of Ed.*, 282 F. Supp. 192 (E.D. Tenn. 1966) (dicta) (granting reinstatement and back pay for discrimination in employment in action brought under 42 U.S.C. 1983 and Title VI), aff'd, 391 F.2d 77 (6th Cir. 1968); *Gautreaux* v. *Chicago Housing Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967) (denying motion to dismiss action challenging allegedly segregated public housing); *McGhee* v. *Nashville Special School Dist. No. 1*, 11 Race Rel. L. Rep. 698 (W.D. Ark. 1966) (equitable remedies for segregated school system); *Lemon* v. *Bossier Parish School Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847, 852 (5th Cir.) (granting injunctive relief against segregated school system), cert. denied, 388 U.S. 911 (1967).

[14] Petitioner takes us to task for describing the monetary relief awarded in *Rolfe* as "back pay," rather than as "damages." Pet. Br. 25 & n.16. However, in the context of Title VII—the principal federal statutory prohibition on employment discrimination—back pay is a form of equitable relief, and does not constitute legal damages. See B. Schlei & P. Grossman, *Employment Discrimination Law* 1452 & n.153 (2d ed. 1983); C. Sullivan, M. Zimmer & R. Richards, *Employment Discrimination* § 15.1, at 53-54 (2d ed. 1988). It is for that reason that the right to a jury trial is inapplicable to Title VII actions. See *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 (1979).

Moreover, while the court of appeals in *Rolfe* did use the term "damages," it did not mention Title VI, let alone describe it as the source of any monetary relief. Unlike the instant case, *Rolfe* was brought under 42 U.S.C. 1983 as well as Title VI, and the court of appeals referred only to Section 1983. The district court's passing reference to Title VI also did not identify that statute as the basis for monetary award. Even if it were reasonable to assume that Congress took its cue from *Rolfe* (and it is not), that case would not support petitioner's position.

378, it would not have expected the courts to award legal damages based upon violations of the statute.

b. The fact that judicial decisions may not have rejected awards of damages (see Pet. Br. 24)—since that issue was not presented—provides no support for a contrary conclusion. For there is evidence that Congress did not intend to provide damages under Title VI; the absence of any decisions suggesting otherwise would have been entirely consistent with that expectation.

During the course of Congress's consideration of legislation ultimately enacted as the Civil Rights Act of 1964, Senators Keating and Ribicoff proposed adding a provision giving private parties the right to enforce Title VI. Under that proposal, a "person aggrieved" by a violation of that statute would have been authorized to commence "a civil action or other proper proceeding *for preventive relief*, including an application for a permanent or temporary injunction, restraining order, or other order" (emphasis added).[15] Senator Keating explained that the purpose of his proposal was to allow suits to terminate funding or to require "specific performance of the nondiscrimination requirement" in Title VI.[16] The proposal was not adopted.

In *Cannon*, 441 U.S. at 716 n.51, this Court found that the omission of the Keating amendment from Title VI did not foreclose recognition of any private right of action under that statute or Title IX. The Court reasoned that the omission could have been part of a compromise, in which Section 601 was redrafted in a form "more conducive to implication of a private remedy against a discriminatory recipient * * *, but * * * arguably *less* conducive to implication of a private remedy against the Government (as well as the recipient) to compel

[15] 109 Cong. Rec. 15,375 (1963) (quoted in *Cannon*, 441 U.S. at 715 n.50).

[16] 109 Cong. Rec. 15,376 (1963) (remarks of Senator Keating). See Hearings Before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess. 349-352 (1963). See generally *Cannon*, 441 U.S. at 713-716 & nn. 49-52.

the cutoff of funds." 441 U.S. at 716 n.51. Be that as it may, it is most unlikely that any member of Congress would have foreseen that such a compromise would lead to more expansive implied relief than even the most enthusiastic supporters of private remedies had advocated.[17]

None of the express private rights of action included in the 1964 Civil Rights Act provided for awards of damages. Title II authorized persons aggrieved by discrimination in public accommodations to commence "a civil action for preventive relief" and to recover attorneys fees. 42 U.S.C. 2000a-3. Title VII authorized injunctions against discrimination, reinstatement, and back pay, but not damages. 42 U.S.C. 2000e-5(g).[18] It is very doubtful that Congress could have intended to grant broader relief by implication in Title VI than it conferred expressly in any other provision of the 1964 Civil Rights Act. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S.Ct. at 2780 ("We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections.").

c. The limitation on the monetary relief recoverable under Title VII is especially significant in view of the fact that the same Congress that enacted Title IX extended Title VII to educational institutions. See Pub. L. No. 92-261, § 3, 86 Stat. 103-104 (deleting the exemption for such institutions from the 1964 Act). In most cases,

[17] Ordinarily, of course, little significance can be attached to Congress's failure to enact a given provision. However, consistent with the unique approach to statutory interpretation that has been brought to bear on implied rights of action, this Court has relied on that type of inaction. *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 538-539 (1984). See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-461 (1974); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 21-22; *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. at 146.

[18] Titles III and IV reserved private rights of action, but did not create them. 42 U.S.C. 2000b-2, 2000c-8.

persons alleging that they have been victimized by employment discrimination on the basis of race, color, or national origin in federally funded programs may not bring an action under Title VI. See 42 U.S.C. 2000d-3. Their remedies lie under Title VII, which is limited to equitable relief. Under petitioner's theory, however, plaintiffs suing under Title IX for employment discrimination on the basis of sex in federally funded programs would be entitled to legal damages. See *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982). If petitioner is correct, then, the 1972 Congress would be deemed to have provided broader relief to employees of educational institutions who were victimized by sex discrimination than by race discrimination. That very implausible result should not be attributed to Congress. See *Shuttleworth* v. *Broward County*, 649 F. Supp. 35, 37 (S.D. Fla. 1986).

2. In *Cannon*, the Court also relied on Section 718 of the Education Amendments of 1972, 86 Stat. 369, as evidence that Congress intended to allow enforcement of Title IX by private parties. See 441 U.S. at 699-701 & nn. 25-28. Section 718, which has since been repealed, authorized an award of attorneys fees in an action under Title VI upon a finding that the action was necessary "to bring about compliance" with the statute. Consistent with the legislative history of Title VI and the actions that had been brought prior to 1972, that language is evocative of equitable relief, but not damages.

C. Administrative Enforcement of Title IX

Petitioner contends that a regulation promulgated by the former Department of Health, Education, and Welfare, 34 C.F.R. 106.3(a), and administrative practice in the enforcement of Title IX, support her claim to damages. Pet Br. 26-27. Neither the regulation nor administrative practice provide any support for a private damages remedy.

1. As its language makes clear, the regulation has nothing to do with the remedies available to private

parties in judicial proceedings. Rather, it directs recipients of federal financial assistance to take remedial action mandated by *the Department of Education* when *the Department* has found a violation (34 C.F.R. 106.3(a)):

> If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

It is, of course, not unusual for enforcement schemes to distinguish between relief that might be sought by the government and that might be available at the behest of private parties. See, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (EPA may seek civil penalties for wholly past violations of Clean Water Act, while citizens suing under citizen-suit provisions may seek penalties only in conjunction with equitable relief).

The remedial orders referred to in the regulation are the end result of administrative proceedings. The regulations permit individuals to file administrative complaints alleging violations of Title IX.[19] (Petitioner filed an administrative complaint commencing such a proceeding before she brought this action. See Amended Compl., Ex. A.) The Office for Civil Rights of the Department of Education is then responsible for conducting an investigation. If OCR concludes that an institution receiving federal financial assistance has violated Title IX, it notifies the institution of the finding and attempts to resolve the matter by informal means—typically by specifying measures that it finds appropriate to bring the institution back into compliance with the statute. See 34 C.F.R.

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[19] 34 C.F.R. 100.7(b). See 34 C.F.R. 106.71 (making procedures promulgated under Title VI applicable to Title IX).

100.7(d).[20] If the matter is not resolved informally, the agency may commence proceedings to suspend or terminate federal financial assistance. 34 C.F.R. 100.8-100.9. Such a suspension or termination may be made contingent on specified terms and conditions, enabling the recipient to avoid a fund cutoff by taking steps to bring itself into compliance with Title IX. 34 C.F.R. 100.10(f).[21]

The remedial steps that the Department has directed in accordance with these procedures have included make-whole equitable relief, such as back pay and restoration of benefits wrongfully withheld. See *Romeo Community Schools* v. *HEW*, 600 F.2d 581, 583 (6th Cir.), cert. denied, 444 U.S. 972 (1979). We are advised, however, that the Department does not condition continuation of financial assistance on payment of legal damages. In any event, Title IX expressly empowers the Department of Education to secure compliance with the statute by terminating or suspending federal assistance or "by any other means authorized by law." 20 U.S.C. 1682. There is no evidence that Congress intended to authorize private litigants to obtain whatever relief is available to the agency charged with enforcing the statute.

2. In fact, recognition of an implied right of action for damages would be inconsistent with a prominent feature of the government's express remedy. The statute directs the government not to commence enforcement proceedings until it has "advised the appropriate person or persons of the failure to comply with [Title IX] and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. 1682. The evident purpose of this scheme is to secure compliance without unduly divert-

[20] In this case, for instance, OCR found that the school district had violated regulations promulgated under Title IX by failing to establish proper grievance procedures for complaints of sexual harassment. Amended Compl., Ex. A, at 7. That violation was resolved, however, by means of an assurance that the district had implemented proper procedures. See *id.* at 8, 9.

[21] A recipient is given the opportunity for a hearing and may seek judicial review. 34 C.F.R. 100.9, 100.11.

ing resources from educational programs to litigation. In our view, the Congress that made the government's express remedy for a violation of Title IX contingent upon the failure of efforts to obtain voluntary compliance with the statute should not be deemed to have saddled educational programs with the burden of litigating private actions seeking damages proximately caused by a past violation.[22]

D. Other Considerations

1. Lacking any evidence that any member of the 1972 Congress actually contemplated awards of damages under Title IX, petitioner argues that the "legal context" prevailing when the statute was enacted warrants attributing the requisite intention to the legislature. See Pet. Br. 21-26. She argues that Congress must have anticipated that the availability of private rights of action would be determined with regard to pre-1972 cases, under which the denial of any remedy was "the exception rather than the rule" (*id.* at 22).

There is no indication that when Title IX was enacted any member of Congress actually relied on this Court's pre-1972 case law regarding implied remedies. Since *Cannon*, moreover, this Court has repeatedly applied its prevailing approach—which requires some evidence of an actual intention to create an implied remedy—to statutes

[22] See *Lieberman* v. *University of Chicago*, 660 F.2d 1185, 1188 (7th Cir. 1981) (awards of legal damages to selected beneficiaries of federal financing programs would threaten "a potentially massive financial liability"), cert. denied, 456 U.S. 937 (1982).

Petitioner and her *amici* make much of the fact that this case involves an allegation of "intentional" discrimination. However, that characterization rests on the assumption that Hill's state of mind (or the state of mind of those who failed to act on information regarding his misconduct) may be imputed to the school district. The availability of *respondeat superior* liability is a serious, unresolved issue. See *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701 (1989).

enacted decades earlier than Title IX.[23] Indeed, if petitioner's approach to legal context were the law, it would have foreclosed the new approach that petitioner claims should not be given effect in this case. As the author of the opinion in *Cannon* observed in one of those cases, "I think it is more important to adhere to the analytical approach the Court has adopted than to base my vote on my own opinion about what Congress probably assumed in 1890." *California* v. *Sierra Club*, 451 U.S. at 301 (Stevens, J., concurring).

That course is well-founded. The courts lack constitutional power to recognize a statutory remedy that Congress has not authorized. They cannot properly circumvent that limitation by assuming that Congress must have expected the judiciary to recognize the remedy even in the absence of an affirmative demonstration of congressional intent. Moreover, in fashioning its current approach, the Court has responded to changes in Congress's practice regarding statutory remedies. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 374-377. There is no justification for applying a pre-

[23] See, *e.g.*, *Touche Ross & Co.* v. *Redington*, *supra* (Securities Exchange Act of 1934); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra* (Investment Advisors Act of 1940); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754 (1981) (Davis Bacon Act of 1931); *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra* (Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963); *California* v. *Sierra Club*, 451 U.S. 287 (1981) (Rivers and Harbors Appropriation Act of 1899); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra* (Sherman Act of 1890 and Clayton Act of 1914); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (Federal Water Pollution Control Act, a statute enacted in 1948 and substantially amended in 1972, and Marine Protection, Research, and Sanctuaries Act of 1972); *Daily Income Fund, Inc.* v. *Fox.*, 464 U.S. 523 (1984) (Investment Company Act of 1940). Significantly, in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 577, this Court declined to extend the analysis of *J.I. Case Co.* v. *Borak*, *supra*, even though it had earlier been used to imply a remedy under the very statute at issue.

sumption here that is at odds with Congress's way of doing business.[24]

2. Petitioner (Pet. Br. 10) and her *amici* suggest that other statutes passed after Title IX support her claim to a damages remedy under Title IX. Those statutes do not shed any light on the question whether the 1972 Congress that enacted Title IX intended to authorize that form of relief. Each of those statutes, moreover, is entirely consistent with the view that damages are unavailable under Title IX. The Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. 2000d-7, withdraws Eleventh Amendment immunity from the States in actions under Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, and authorizes recovery from States of "remedies (including remedies both at law and in equity) * * * to the same extent as such remedies are available * * * against any public or private entity other than a State." The statute only provides for equal treatment of States and other defendants; it does not indicate what remedies are available from them. Cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 329 n.22 (1981) (savings clause preserving other remedies tells nothing about what other remedies may be available).[25] Likewise, the pertinent

[24] Even on its own terms, the inference that petitioner advocates is tenuous at best. Would it have been reasonable for any single member of Congress to have assumed, in 1972, that a statute would be construed in 1991 by reference only to decisions prior to 1972? Would any single member of Congress have been safe in assuming that his position on the meaning of those precedents and their continuing applicability would be shared by others? Would this Court be on firm ground in imputing meaning to silence on the basis of its answers to those questions? See *Thompson* v. *Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment) ("It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.").

[25] The statute was enacted in response to this Court's decision in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), which held that Section 504 of the Rehabilitation Act did not abrogate

provisions of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28-31, define the scope of the federally funded "programs" and "activities" in which discrimination is prohibited. See *Grove City College* v. *Bell*, 465 U.S. 555 (1984).

3. Finally, petitioner and her *amici* argue that damages have traditionally been favored over equitable relief, that any refusal to award damages would leave those in her position without compensation, that Congress could not have visualized a distinction between make-whole equitable relief (such as backpay) and damages, and that damages are best suited to accomplish the goals of Title IX. Pet. Br. 27-32. There is no evidence that Congress shared petitioner's assessment of those respective remedies.

To the contrary, in the one federal funding statute that does specify a private remedy for discrimination in federally funded programs, Congress provided only for injunctions. See 42 U.S.C. 6104(e). In Title VII, Congress limited victims of sex discrimination in employment, such as sexual harassment, to equitable relief, including backpay. The wisdom of that limitation is among the most contentious issues in the current debate over proposed civil rights legislation. Title VII is not exceptional in limiting private parties to specified forms of monetary relief. See *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 148 (although ERISA provides for recovery of withheld benefits, no recovery of "extracontractual damages caused by improper or untimely processing of benefit claims"); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 24 n.14 (construing Investment Advisors Act to provide for restitution, but not damages). A decision to grant equitable relief, but not consequential damages, cannot fairly be

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Eleventh Amendment immunity. That immunity is available against forms of relief other than damages. *Milliken* v. *Bradley*, 433 U.S. 267, 288-291 (1977); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

dismissed as unprincipled. *Burlington School Comm.* v. *Dept. of Ed.*, 471 U.S. 359, 370-371 (1985). It would not be arbitrary to conclude that judicial relief under Title IX should be focused on eliminating discrimination from federally funded programs, while avoiding damages awards that could reduce the resources available to all participants in the programs.

The point is that reasonable members of Congress could well differ on such questions. There is no evidence that the 1972 Congress resolved those questions in favor of a damages remedy under Title IX and, *sub silentio*, enacted that preference into law. Congress did not create an express private right of action for damages, nor is there any indication it intended the judiciary to imply one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 90-918

IN THE

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CHRISTINE FRANKLIN,
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GWINNETT COUNTY SCHOOL DISTRICT and
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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the private right of action under Title IX of the Education Amendment of 1972 excludes the traditional remedy of damages.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 911 F.2d 617 and reprinted at Pet. App. 1. The opinion of the United States District Court for the Northern District of Georgia is unreported and printed at Pet. App. 15.

JURISDICTION

The court of appeals entered judgment on September 10, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1)

STATUTE INVOLVED

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) *et seq.*, provides in relevant part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

STATEMENT

This case involves a high school student who seeks monetary damages under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), for intentional discrimination. The court of appeals affirmed the district court's dismissal of the action on the ground that such relief is not available under Title IX.[1]

1. Petitioner Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia, between September 1985 and August 1989. Respondent Gwinnett County School District operates the high school and is a recipient of federal funds. According to petitioner's complaint, beginning in the fall of 1986, when she was in the tenth grade, she was subjected to a continuing course of intentional sexual harassment, culminating in forced intercourse, by Andrew Hill, a sports coach and teacher employed by the District.

During the 1986-87 school year, while petitioner was a student in his economics class, Hill would assign work to the class and then ask petitioner to come to his private office, where he would engage her in sexually oriented

[1] The listing required by Rule 29.1 of this Court is set forth in the caption of the case. Dr. William Prescott, who appears as a respondent, was named as a defendant in the complaint. Petitioner did not pursue claims against him in the court of appeals (Pet. App. 12-13), and there are no issues before this Court with respect to him.

conversation. Comp. ¶¶ 9, 10; Ex. A at 3.[2] In these conversations, Hill asked about, among other subjects, petitioner's sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man. Comp. ¶ 10. Because these sessions often caused petitioner to be late for her next class, Hill would write notes excusing her lateness or would accompany her to her class and inform her teacher that she had been with him. Comp. ¶ 13; Ex. A at 3. When petitioner confronted Hill regarding rumors that the two were having a sexual relationship, he forcibly kissed her on the mouth. Comp. ¶ 17. During the summer of 1987, Hill telephoned petitioner at her home, informed her that his wife was out of town, and suggested that the two get together. *Id.* ¶ 21; Ex. A at 4-5.

Hill resumed his pattern of harassment during the 1987-88 school year. Ex. A at 5. He would repeatedly meet petitioner after her classes and walk with her or write a note excusing her from class and take her to his office. Comp. ¶ 22; Ex. A at 5. On three occasions, between October and December 1987, Hill interrupted petitioner while she was in class, asked her teacher to excuse her, took her to a private office, and had sexual intercourse with her. Comp. ¶¶ 25, 27, 32. On one of these occasions, Hill threatened petitioner that he would disclose their relationship to her mother and boyfriend if she refused to have intercourse with him. *Id.* ¶ 27.

Several teachers and administrators at the high school were aware of Hill's sexual harassment of petitioner and other female students, but they took no action to rectify matters. *Id.* ¶¶ 23, 24. In 1986, petitioner's boyfriend told Dr. William Prescott, the school band director, that Hill frequently invited petitioner to his office, where he

[2] Petitioner filed a Complaint and an Amended Complaint in which she incorporated as Exhibit A the report of the United States Department of Education's Office of Civil Rights based on that office's investigation of the harassment involved in this case.

would initiate sexually explicit conversations, and often caused her to be late for her other classes. Prescott responded that he would write Hill a letter admonishing him for his inappropriate behavior. *Id.* ¶ 18; Ex. A at 4. In October 1987, a female student reported to an assistant principal that Hill had made inappropriate personal comments to her and that he had also sexually harassed petitioner. The assistant principal chastised the student for her allegations and took no further action. Comp. ¶ 24. Shortly thereafter, another student, supported by documentation, reported Hill's conduct to a guidance counselor. The counselor discussed the matter with an assistant principal, who advised the counselor to bring it to the attention of the principal. The student and counselor met with the principal, who assured them that he would talk with Hill. *Id.* ¶ 29. The principal later told the student that he had spoken with Hill. *Id.* ¶ 30. An assistant athletic director also met with Hill regarding the allegations against him. *Id.* ¶ 31. In February 1988, several students and a faculty member again reported to the principal that Hill had sexually harassed petitioner and others. *Id.* ¶ 33. In March 1988, petitioner herself met with the principal and confirmed that Hill had abused her. *Id.* ¶ 35.

In March 1988, the school initiated an official investigation of Hill. *Id.* ¶ 34. While the investigation was in progress, Dr. Prescott met with petitioner and attempted to pressure her into dropping the charges against Hill. Prescott told petitioner that her efforts would injure her (as well as the school's) reputation and that her name would be in the newspaper and on television. *Id.* ¶ 35; Ex. A. at 6. Prescott further sought to enlist the aid of petitioner's boyfriend to dissuade her from pursuing her grievance. Ex. A at 6. Hill also approached petitioner and told her to drop the allegations against him. *Ibid.*

In April 1988, the school's investigator concluded that the allegations against Hill were true. Comp. ¶ 36. On

April 14, 1988, Hill resigned on condition that all matters pending against him be dropped. *Id.* ¶ 37; Ex. A at 7. Upon Hill's resignation, the school closed its investigation. Comp. ¶ 37. Subsequently, Prescott resigned as well. *Id.* ¶ 6.

2. In August 1988, petitioner filed a complaint with the Office for Civil Rights ("OCR") of the United States Department of Education, charging that respondent had intentionally discriminated against her on the basis of sex in violation of Title IX. After several months of investigation, OCR found that respondent had violated petitioner's rights by subjecting her to physical and verbal sexual harassment and by interfering with her right to complain about conduct proscribed by Title IX. Ex. A at 7. OCR concluded, however, that because Hill and Prescott had resigned and the District had agreed to implement certain grievance procedures, the District had come back into compliance with Title IX. With no relief for petitioner, OCR terminated its investigation. *Id.* at 8-9.

3. On December 29, 1988, petitioner filed this action. The district court, relying on binding circuit-court precedent, dismissed the complaint on the ground that Title IX does not authorize an award of damages. Pet. App. 18-20 (citing *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129, 133 (5th Cir. 1981)); *see Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (decisions of the Fifth Circuit prior to Oct. 1, 1981, are binding in the Eleventh Circuit).

The Eleventh Circuit affirmed. Pet. App. 13. Recognizing that analysis of Title IX follows the law developed under Title VI of the Civil Rights of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI"), the court of appeals first looked to this Court's decision in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), and concluded that the absence of a majority opinion left unresolved the question whether damages were available under Title VI

for intentional discrimination. Pet. App. 9. The court of appeals next reasoned that Title IX was enacted pursuant to Congress's Spending Clause powers and that "[u]nder such statutes, relief may frequently be limited to that which is equitable in nature, with the recipient of federal funds thus retaining the option of terminating such receipt in order to rid itself of an injunction." Pet. App. 9-10 (citation omitted). The court thus concluded that, in dealing with "Spending Clause legislation[,] . . . we proceed with extreme care when we are asked to find a right to compensatory relief where Congress has not expressly-provided such a remedy as a part of the statutory scheme, where the Supreme Court has not spoken clearly, and where binding precedent in this circuit is contrary." *Id.* at 11. On this basis, the court ruled that petitioner was entitled to no relief for the violation of her Title IX right to be free of sexual abuse.[3]

SUMMARY OF ARGUMENT

This Court has repeatedly reaffirmed that Congress intended Title IX to be enforced through a private right of action. *E.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979). The question in this case is whether that private action allows for the traditional legal remedy of damages. For two reasons, the answer must be yes.

1. The question of what remedies are available under a statute that provides for a private right of action is "analytically distinct" from the prior question of whether such a right of action exists. *Davis v. Passman*, 442 U.S. 228, 239 (1972). With respect to the question of remedies, the rule has long been that all customary judicial relief, including damages, is presumptively available when Congress provides a private right of action. *See, e.g., Bell v.*

[3] Judge Johnson concurred in the judgment, concluding that the decision in *Drayden v. Needville Indep. School Dist.* "alone is dispositive of this case." Pet. App. 14.

Hood, 327 U.S. 678, 684 (1946). That rule is eminently sensible. It rests on the natural expectation that, other things being equal, when the federal courts have jurisdiction, they may exercise it fully. Such a rule also avoids the need for courts either to nullify legislation because no particular remedy is specified or to decide on an *ad hoc* basis which remedies would best further Congress's purposes. On the other hand, the concern that led this Court to restrict its implied right of action jurisprudence —*i.e.*, that courts should not be making legislative decisions that have the effect of expanding their own jurisdictional reach—evaporates once Congress decides that resort to judicial enforcement is warranted. Contrary to the view of the court below, moreover, this presumption in favor of traditional remedies applies to statutes enacted pursuant to the Spending Clause. And its application to Title IX, in particular, demonstrates that damages are an appropriate remedy for petitioner's claims of sexual harassment.

2. Even without the presumption in favor of traditional remedies, a fair reading of congressional intent indicates that Title IX allows for damages. First, at the time Congress enacted Title IX, this Court was repeatedly and consistently approving implied damages remedies as a matter of federal common law. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). It is plainly reasonable to conclude, as did the *Cannon* Court (441 U.S. at 699), that Congress was aware of and relied on this Court's approach. Second, the administrative interpretation of Title IX also supports the availability of compensatory relief "to overcome the effects of [statutorily proscribed] discrimination." 34 C.F.R. § 106.3(a). And third, in view of this Court's decisions under Title IX and its sister statutes (Title VI and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504")), holding

that injunctive and back pay remedies are available under these statutes, it makes no sense to think Congress prohibited damages: injunctions are normally a disfavored remedy; and given Title IX's core concern with *students*, it seems unlikely that Congress would have denied a compensatory remedy to them while simultaneously affording one to school *employees*, who already had such a remedy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII").

ARGUMENT

In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), this Court held that Title IX is enforceable through an implied right of action. Following the method of *Cort v. Ash*, 422 U.S. 66, 78 (1975), the *Cannon* Court concluded that (a) Title IX has "an unmistakable focus on the benefited class," explicitly conferring the right to be free of sex discrimination (441 U.S. at 691); (b) the 1972 Congress that enacted Title IX intended it to mirror Title VI, and the clear contemporaneous understanding of Title VI was that it allowed private actions—an understanding that continued to be reflected in judicial, legislative, and executive action after 1972, for both Title VI and Title IX (441 U.S. at 694-703); (c) "[t]he award of individual relief to a private litigant" not only furthers the congressional purpose of protecting individuals against sex discrimination but is sometimes "necessary" to serve that statutory purpose, because the alternative of a fund cutoff to an entire program or institution is so severe (and harmful to the intended beneficiaries of funding) that it is often inappropriate (441 U.S. at 705-06; *see id.* at 703-08); and (d) the area of discrimination, especially by the recipients of federal funds, is not primarily a state concern but is of central *federal* concern (441 U.S. at 708-09).

Cannon thus established that Congress in Title IX had implicitly authorized the victims of sex discrimination to

bring suit against a federal grantee that discriminates—exactly as if Title IX contained an explicit provision stating: "an individual may bring an action in federal court to seek relief for violations of the provisions of this title."

The existence of this federal right of action is not disputed in this case and is, in any event, firmly settled. This Court has built on *Cannon* in recognizing implied rights of action seeking relief from discrimination by federal fund recipients under Title VI (*Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983)) and under Section 504 (*Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984)). The Court's opinions, moreover, including those rejecting private rights of action, have repeatedly cited *Cannon* with approval. *See, e.g., Thompson v. Thompson*, 484 U.S. 174, 179 (1988); *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 536 (1984); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374, 381 (1982); *California v. Sierra Club*, 451 U.S. 287, 293-95 (1981); *Northwest Airlines, Inc. v. Transport Union Workers*, 451 U.S. 77, 90-92 (1981).[4] And the *Cannon* Court's approach—using the *Cort v. Ash* factors as "guides to discerning [congressional] intent" that is "implicit[] in the language or structure of the statute, or in the circumstances of its enactment"—remains the governing mode of analysis. *Thompson*, 484 U.S. at 179 (citation omitted).[5]

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[4] Indeed, Justice Powell, who dissented in *Cannon*, wrote the *Darrone* opinion building on it. And Justices Scalia and O'Connor in *Thompson* specifically exempted *Cannon* from the criticism they leveled at the *Thompson* majority's analysis. 484 U.S. at 189-90 (Scalia, J., concurring in the judgment); *id.* at 188 (O'Connor, J., concurring in part and concurring in the judgment). Justice Scalia, for himself, suggested in *Thompson* that, *"if"* the implied-right-of-action doctrine were to be changed, the doctrine should be abolished. *Id.* at 191-92.

[5] *Thompson* explained that implied rights of action are not limited to cases of drafting errors or inadvertent omissions where "Members of Congress . . . actually had in mind the creation of a

The result in *Cannon* has also been recently reaffirmed by Congress. In the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7, Congress abrogated the States' Eleventh Amendment immunity under several statutes, including specifically Title IX. Congress obviously would have had no reason to do that unless Title IX contained a private right of action. In addition, Congress left *Cannon* undisturbed when it extended Title IX in 1988. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988).[6] Finally, *Cannon* has proved to be neither confusing nor unworkable in any respect. In these circumstances, *Cannon* must be taken as the starting point in this case. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[7]

Accepting *Cannon*, then, means that the sole issue here is the scope of relief available under the private right of action that Congress intended to provide. Specifically, the question is whether Title IX allows petitioner to pursue the usual remedy of damages for injuries suffered,

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private cause of action." 484 U.S. at 179. An implied right of action, like other implications from statutes, may be implicit in the text, structure, or background of a statute, even if no legislative history reveals an affirmative specific intent on the question. *Ibid.*

[6] Many of the cases discussed in the legislative history of this statute were private suits (some seeking damages). *See, e.g.*, S. Rep. No. 64, 100th Cong., 1st Sess. 10, 15 (1987).

[7] That *Cannon* leads to overlapping and somewhat different statutory discrimination remedies—a fact noted by the United States in its *amicus* brief on the petition in this case (U.S. Br. at 17-18)—is no ground for overruling the decision. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982) ("this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination"); *Cannon*, 441 U.S. at 711 (existence of alternative rights of action no ground for rejecting implied right of action); *see also Patterson*, 491 U.S. at 173-74 (similar argument rejected with regard to *Runyon* v. *McCrary*, 427 U.S. 160 (1976)); *Johnson v. Railway Express Agency*, 421 U.S. 454, 471-73 (1975).

particularly where the injunctive and "back pay" remedies that have already been recognized under the statute would be of no benefit whatever to her. In our view, there are two separate, but reinforcing, reasons to conclude that such damages are available. First, there is the well-settled statutory presumption that, when Congress authorizes a private right of action, it intends to allow all appropriate, traditional forms of judicial relief, unless it indicates otherwise, which it has not done here. Second, an independent evaluation of congressional intent under Title IX confirms the availability of a damages remedy.

I. ALL APPROPRIATE REMEDIES ARE PRESUMPTIVELY AVAILABLE TO EFFECTUATE A CONGRESSIONALLY AUTHORIZED RIGHT OF ACTION.

The question whether an implied right of action exists—and thereby creates jurisdiction over cases that would not otherwise be in court—is quite different from the question of what remedies may be awarded once the plaintiff is authorized to bring suit. On the question of remedies, which is the issue in this case, "[t]he usual rule is that where legal rights have been invaded *and a cause of action is available*, a federal court may use *any available remedy to afford full relief*." *Guardians*, 463 U.S. at 595 (opinion of White, J.) (emphasis added). Thus, once Congress has authorized a private right of action, the courts should presume that full enforcement is available unless Congress indicates otherwise—which it has not done with respect to Title IX. Contrary to the conclusion of the court of appeals in this case, moreover, the decision in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), does not abrogate that settled principle in Spending Clause cases.

A. This Court long ago recognized that it is "well settled that where legal rights have been invaded, and a

federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (citing cases). Thus, even prior to *Bell*, the Court had held that, despite the express provision of particular monetary remedies in the Securities Act of 1933, 15 U.S.C. § 77*l*(2), a plaintiff could secure broad equitable relief as well. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287-88 (1940). The Court's rationale was that "the power to make [a statutory] right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." *Id.* at 288. The *Deckert* Court also explained that the fact that a statute "does not authorize [the remedy at issue] in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment." *Ibid.*

The presumption in favor of the availability of traditional remedies has been repeatedly reaffirmed since *Bell v. Hood*. In *J.I. Case Co. v. Borak*, 377 U.S. 426, 434 (1964), for example, the Court, relying on *Bell*, unanimously rejected the argument that remedies under Section 14(a) of the Securities Exchange Act of 1934 are "limited to prospective relief." *See S.I.P.C. v. Barbour*, 421 U.S. 412, 424 (1975) (describing *Borak*). Likewise, in holding that damages are available under the Civil Rights Act of 1866, 42 U.S.C. § 1982, the Court again concluded that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). *See also Carey v. Piphus*, 435 U.S. 247, 255 (1978) (damages available under 42 U.S.C. § 1983 even though enacting Congress did not specifically address the issue).

For present purposes, the most important examples of the Court's adherence to this presumption are its decisions

with respect to Title IX's sister statutes—Title VI and Section 504. In the Title VI case (*Guardians*, *supra*), although the Court was splintered because two separate issues were presented, its Members nonetheless generally agreed on the presumptive availability of all remedies once a private action is authorized. Thus, Justice Stevens, joined by Justices Brennan and Blackmun, found that Title VI allows for damages, concluding that it was "most improbable that Congress contemplated so significant and unusual a limitation [*i.e.*, no damages] on the forms of relief available to a victim of racial discrimination, but said absolutely nothing about it in the text of the statute." 463 U.S. at 636 (dissenting opinion); *see id.* at 612 & n.1 (O'Connor, J., concurring).[8] Justice Marshall, expressly relying on *Bell v. Hood* and similar cases, also found that damages were available under Title VI. *Id.* at 624-28 (dissenting opinion). And Justice White, joined by then-Justice Rehnquist, acknowledged the basic presumption (citing *Bell v. Hood*), but concluded that it did not apply to Title VI cases involving *non*-intentional discrimination. *Id.* at 595. No Justice questioned the presumption.

These various opinions were harmonized one year later. Thus, in *Consolidated Rail Corp. v. Darrone*, a unanimous Court held that the 1978 amendment to Section 504—which had expressly incorporated the "remedies, procedures, and rights set forth in Title VI" (29 U.S.C. § 794a(a)(2))—authorizes a back pay award. The basis for this ruling was simply that "[a] majority of the Court [in *Guardians*] agreed that retroactive relief is available to private plaintiffs for all discrimination . . . that is actionable under Title VI." 465 U.S. at 630 (emphasis added). Indeed, "no Member of the Court [in

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[8] Justice O'Connor agreed with Justice Stevens's "reasons" and further agreed that Title VI permits back pay, but left open the question whether it allows for other monetary relief. 463 U.S. at 613.

Guardians] contended that backpay was unavailable, at least as a remedy for intentional discrimination." *Id.* at 630 n.9. Since Section 504 is read *in pari materia* with Title VI, the Court in *Darrone* concluded that Section 504 also authorizes a back pay remedy.

These two opinions thus reaffirm the traditional presumption that all remedies attach when Congress creates a private right of action. There is no other basis on which the cases could have been decided. None of the opinions in these cases found that the language or legislative history of Title VI independently demonstrates Congress's intent to provide a back pay remedy.[9] This same analysis must also be followed under Title IX, which, like Section 504, was clearly based on Title VI. *See, e.g., Cannon*, 441 U.S. at 694-96; *United States Dep't of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 600 n.4 (1986).

The United States is thus fundamentally incorrect when it starts its argument in this case with the assertion that "[t]he issue of what relief is available to private parties under a statute—like the question whether any private right of action exists at all—is 'basically a matter of statutory construction.'" U.S. Br. 14 (quoting *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)). On the contrary, as the above decisions confirm, "the question whether a litigant has a 'cause of action' is *analytically distinct* and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979) (emphasis supplied). And the latter question has long been governed by a rule leaving the courts to apply their usual remedies to claims properly before them, not by a requirement that any particular remedy be intended by Congress before a court can award it.

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[9] With respect to Section 504, the Court in *Darrone* noted merely that its legislative history had included a "few references to [back pay that] are consistent with our holding." 465 U.S. at 631 n.10.

B. The presumption supporting the availability of remedies is entirely reasonable and should not be changed. The indisputable fact is that a court simply cannot avoid deciding what remedies are available when Congress creates a private right of action but fails to specify the available relief. Thus, given the need for some rule to govern unspecified remedies, it is clear for several reasons that the best—indeed, the only—solution is to presume the availability of all appropriate remedies.

To begin with, such a presumption reflects the commonly recognized fact that, in a merged system of law and equity, when the federal courts have jurisdiction to hear a case, they generally are *not* restricted in their ability to afford full relief. Moreover, the other potential approaches for deciding what remedies are available when Congress leaves them unspecified are plainly less palatable. First, to presume that *no* remedy is available in those circumstances would undo any statute that simply provides for a private right of action. Such judicial nullification is obviously troubling and should be avoided where possible. Indeed, even when the issue is not as serious as the destruction of jurisdiction that Congress seeks to confer, the "cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). *See South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 510 n.22 (1986) ("It is an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.") (internal quotation omitted). The other possible alternative to the presumption in favor of remedies is to have the courts decide afresh, on an *ad hoc* basis, which remedies properly further the "purposes" of any given statute. But that approach would only increase the law's uncertainty, while giving the courts the kind of legislative authority that they are ill-suited to exercise—and that has troubled Members of the Court in cases involving implied rights of action. *See*

Cannon, 441 U.S. at 732-47 (Powell, J., dissenting); *Thompson*, 484 U.S. at 190-91 (Scalia, J., concurring in the judgment).

On the other hand, a rule presuming the availability of traditional remedies when Congress provides a right of action does not raise the concerns that led the Court to adopt "a stricter standard for the implication of private causes of action." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979). Specifically, there have been two reasons given for the Court's shift in approach to implied rights of action. First, "[t]he increased complexity of federal legislation and the increased volume of federal litigation strongly supported the desirability of a more careful scrutiny of legislative intent than [our earlier cases] had required." *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 377 (1982) (footnote omitted). And second, some Justices have argued that "[b]y creating a private action, a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. This runs contrary to the established principle that '[t]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation,' and conflicts with the authority of Congress under Art. III to set the limits of federal jurisdiction." *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting) (internal citations and footnote omitted). *See also Thompson v. Thompson*, 484 U.S. at 190-91 (Scalia, J., concurring in the judgment).

But once it has been determined that Congress intends to allow private actions, there is no longer any question of the courts creating jurisdiction on their own. Moreover, in such circumstances, the essential policy choice about the need for litigation to vindicate statutory interests has been made by the appropriate Branch. Thus, there is simply no basis for suggesting that the presumption concerning the availability of remedies when

Congress provides a private cause of action has been—or should be—undone by the Court's recent rulings on the "analytically distinct . . . question whether a litigant has a 'cause of action.'" *Davis v. Passman*, 442 U.S. at 239.

C. The court of appeals in this case nevertheless followed a very different approach, adopting a strong presumption *against* damages because Title IX was enacted pursuant to Congress's power under the Spending Clause. Pet. App. 9-11. This analysis purported to follow Justice White's opinion in *Guardians*, which in turn rested on *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1 (1981). *See also Lieberman v. University of Chicago*, 660 F.2d 1185, 1187 (7th Cir. 1981) (finding no damages remedy under Title IX, based on *Pennhurst*), *cert. denied*, 456 U.S. 937 (1982). According to Justice White, *Pennhurst* creates a "presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power." *Guardians*, 463 U.S. at 602. Thus, because the violation at issue in *Guardians* was not intentional, Justice White concluded that a damages remedy was unavailable.

Aside from the fact that Justice White's opinion was joined by only one other Justice, there are several reasons for not extending his analysis rejecting damages relief to the present case. Most plainly, as Justice White himself made clear, his decision was meant to apply only to "unintended violations," when it is "surely not obvious that the grantee was aware that it was administering the program in violation of the statute." 463 U.S. at 598. Indeed, Justice White expressly stated that, when intentional statutory violations are at issue, "it may be that the victim . . . should be entitled to a compensatory award." *Id.* at 597. The present case, of course, involves an unmistakable claim of *intentional* discrimination. As

this Court has observed, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting 42 U.S.C. § 2000e-2(a)(1)). The same is obviously true when a teacher sexually abuses a student.

The distinction between intentional and unintentional violations presumably allowed Justice White to join the unanimous opinion in *Darrone*, a case that respondent and the court below simply ignored. The approval of a back pay remedy in that case, which did involve intentional discrimination (465 U.S. at 628), is simply irreconcilable with the view that monetary relief is not warranted under a Spending Clause statute "where Congress has not expressly provided such a remedy as a part of the statutory scheme." Pet. App. 11. By the same token, the Eleventh Circuit's reliance (Pet. App. 10) on the quote from *Pennhurst* that "in no [Spending Clause] case . . . have we required a State to provide money to plaintiffs" (451 U.S. at 29), is also clearly mistaken after *Darrone*.

In any event, the application of *Pennhurst* to ascertain the availability of particular remedies—in contrast to determining a federal grantee's substantive obligations—is an insupportable extension. It is one thing to conclude that "[t]here can, of course, be no knowing acceptance [of a federal grant] if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst*, 451 U.S. at 17. But it is an entirely different thing to argue that where, as here, the conditions of the grant are clear—*i.e.*, no sex discrimination—a recipient should be entitled to rely on the statute's nonenforcement because Congress has not specifically authorized the use of all customary remedies. On the contrary, it is far more reasonable to presume that Congress intends full enforcement when it authorizes a private action. If anything, that conclusion would appear to be especially compelling under a Spending Clause statute, where there is every reason to think that Congress would want to ensure that *its* monies have not been, and will not be, used to support discrimination.[10]

D. Application of the presumption in favor of traditional remedies to the present case compels the conclusion that damages are available to petitioner. Of course, discrimination claims have generally been found remediable through damages awards under civil rights statutes, such as 42 U.S.C. §§ 1981, 1982, & 1983. As the Court explained with respect to Section 1983, "[t]he cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." *Carey v. Piphus*, 435 U.S. at 254-55 (internal quotation omitted) (emphasis in original). *See also Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 395 (1971) ("[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty").

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[10] Even if there were some unique limitation on remedies available under a Spending Clause statute, we do not think that Title IX should be categorized as having been based solely on Congress's spending power. The statute rests as well on Congress's power under Section 5 of the Fourteenth Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 244 n.5 (1985) (analyzing § 504 under both § 5 and Spending Clause). As the Court recognized in *Cannon*, Title IX, in addition to prohibiting the use of federal funds to support discriminatory practices, also sought to "provide individual citizens effective protection against those practices." 441 U.S. at 704. That view certainly reflects a traditional exercise of congressional power under the Fourteenth Amendment. Moreover, when Congress enacted the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, which explicitly applies to Title IX, the Senate Report explained that the statute was enacted pursuant to "Congress' powers under, *inter alia*, the Fourteenth Amendment, Section 5." S. Rep. No. 1011, 94th Cong., 2d Sess. 5, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5913. *See also Cannon*, 441 U.S. at 686 n.7.

Nor can there be any question that the sexual abuse alleged by petitioner involves the kind of discrimination that causes substantial, lasting harm to its victims. Here, as in *Meritor Sav. Bank*, petitioner's allegations "include not only pervasive harassment but also criminal conduct of the most serious nature." 477 U.S. at 63. The psychological and emotional harm resulting from sexual abuse by a teacher of a student is well documented; and such harm is a familiar compensable injury in common law tort systems. *See generally* Restatement (Second) of Torts § 18 (battery); § 21 (assault); § 30 (conditional threat); § 46 (outrageous conduct causing severe emotional distress); and the illustrations provided therein.

Lastly, there is no basis for suggesting that Congress wanted to curtail the availability of any traditional remedy under Title IX. In contrast to a statute like the one at issue in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), Title IX does not contain an express private remedy.[11] *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) (court may order "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate") ("Title VII"). Nor has Congress provided any other reason to think that it wanted to prohibit the generally favored judicial remedy of damages. To the contrary, as we now show, all indications are that Congress intended to allow for that remedy.

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[11] As the Court held in *Cannon*, Title IX's funding cut-off provision, available to the government, plainly is not an exclusive remedy. 441 U.S. at 704-08. *See also Guardians*; *Darrone*. Indeed, given that a fund cut-off may harm many students, that remedy often would be found inappropriate for use in redressing an isolated violation—thus making individual relief all the more "necessary." *Cannon*, 441 U.S. at 706.

II. A DIRECT ASSESSMENT OF CONGRESSIONAL INTENT DEMONSTRATES THAT DAMAGES ARE AVAILABLE UNDER TITLE IX.

Apart from the presumption in favor of the availability of remedies when Congress creates a private right of action, an examination of the usual factors for discerning congressional intent when a statute is silent on an issue supports the conclusion that Title IX authorizes damages. We rely on three considerations: (a) the specific legal context in which Congress was legislating when it enacted Title IX; (b) the views of the federal agency responsible for administering the statute; and (c) the fact that interpreting Title IX as the United States does—to permit injunctions and back pay, but not damages—is insupportable.

A. The same basic considerations that led the Court in *Cannon* to hold that Congress intended to provide a private right of action under Title IX also require the conclusion that damages are available. In particular, *Cannon* relied heavily on the view that "our evaluation of congressional action in 1972 must take into account its contemporary legal context." 441 U.S. at 698-99. This Court has confirmed its adherence to that method of statutory interpretation on several occasions. Recently in *Thompson v. Thompson*, for example, the Court explained that, in ascertaining whether Congress intended to provide a right of action, "[w]e examine initially the context of the [statute] with an eye toward determining Congress' perception of the law that it was shaping or reshaping." 484 U.S. at 180. *See also Merrill Lynch*, 456 U.S. at 378 ("[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on that issue, the initial focus must be on the state of the law at the time the legislation was enacted"). The same principle of statutory interpretation has also been applied in cases involving questions other than the availability of a private right of action. *See, e.g., International Primate*

Protection League v. Administrators of Tulane Educ. Fund, 111 S. Ct. 1700, 1707 (1991) (quoting *Cannon*); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("[w]e generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts"); *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988) (relying on *Cannon* for "the well-settled presumption that Congress understands the state of existing law when it legislates").[12]

The legal context in which Congress was acting when it passed Title IX in 1972 could hardly have been clearer about the fact that this Court would imply a damages remedy under the statute. During that era, the Court, "following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule." *Merrill Lynch*, 456 U.S. at 375 & 376 (footnote omitted). It thus declined to recognize a traditional remedy only when "the statute in question was a general regulatory prohibition enacted for the benefit of the public at large, or [when] there was evidence that Congress intended an express remedy to provide the exclusive method of enforcement." *Ibid.*

The classic formulation of this common law approach was set out in *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 40 (1916), where the Court held that "[a] disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied." This prin-

[12] In *Thompson*, two Justices indicated that reliance on legal context in discerning congressional intent should be limited to judicial interpretations of a specific statute that is being reenacted or of a statute to which a subsequent statute is related. 484 U.S. at 188-90 (Scalia, J., concurring in the judgment, joined by O'Connor, J.). Even under that approach, as we show in text (*see* pp. 24-25 *infra*), there is support for reading Title IX to include a damages remedy.

ciple was well accepted by the time Titles VI and IX were enacted. Indeed, in 1964, in what was widely viewed as a landmark decision confirming the breadth of the *Rigsby* principle, the Court found an implied right of action for damages under Section 14(a) of the Securities Exchange Act of 1934, explaining that "it is the *duty* of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J.I. Case Co. v. Borak*, 377 U.S. at 433 (emphasis added). The *Borak* Court also relied on the broad language from *Bell v. Hood*, concluding that "federal courts may use any available remedy to make good the wrong done." *Ibid.*

In fact, "[i]n the decade preceding the enactment of Title IX, the Court decided six implied-cause-of-action cases. In all of them, a cause of action was found." *Cannon*, 441 U.S. at 698 n.23.[13] A damages remedy was approved in three of those cases;[14] and in no case did the Court indicate that such relief was unavailable. Among the cases approving damages, moreover, was a major civil rights case decided in 1969, involving 42 U.S.C. § 1982, where the Court flatly ruled that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. at 239. The *Sullivan* Court further emphasized that "[t]he rule of damages, whether drawn from federal or state sources, is a federal rule respon-

[13] The six cases referred to are *J.I. Case Co. v. Borak, supra*; *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969); *Sullivan v. Little Hunting Park, Inc., supra*; and *Superintendent of Ins. v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

[14] *See J.I. Case Co. v. Borak, supra*; *Wyandotte Transp. Co. v. United States, supra*; and *Sullivan v. Little Hunting Park, Inc., supra.*

sive to the need whenever a federal right is impaired." *Id.* at 240.[15]

In addition, during the year immediately preceding Title IX's enactment, the Court first recognized a damages remedy, not expressly authorized by Congress, for a constitutional violation. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. at 397. That decision rested largely on an analogy to the *established* rule in statutory cases. *Id.* at 396. *See also id.* at 407 (Harlan J., concurring) ("at the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these [constitutional] interests than with respect to interests protected by federal statutes").

Furthermore, the lower courts' interpretation of Title VI of the Civil Rights Act of 1964—on which Title IX was clearly patterned—had repeatedly upheld private enforcement of the statute. *See Cannon*, 441 U.S. at 396 & n.21 (summarizing cases). None of these cases gave the slightest hint that damages were unavailable,

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[15] It is also instructive to consider the United State's *amicus curiae* brief in *Sullivan*, which set forth the governing law as follows:

> courts have "the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available." *Brewer v. Hoxie School District No. 46*, 238 F.2d 91, 98 (C.A. 8); *Bell v. Hood*, 327 U.S. 678, 684; *see also Texas & N.O.R. Co. v. Ry. Clerks*, 281 U.S. 548, 569-70; *Porter v. Warner Co.*, 328 U.S. 395, 398; *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291-292; *State of Alabama v. United States*, 304 F.2d 583, 590-591 (C.A. 5), affirmed, 371 U.S. 37; *J.I. Case Co. v. Borak*, 377 U.S. 426, 433. Were the judicial responsibility viewed otherwise, the courts would "impute to Congress a futility inconsistent with the great design of this legislation." *United States v. Republic Steel Corp.*, 362 U.S. 482, 492.

U.S. Br. at 36.

and in the only case to consider the issue, the court upheld such an award. *See Rolfe v. County Bd. of Educ.*, 282 F. Supp. 192 (E.D. Tenn. 1966), *aff'd*, 391 F.2d 77 (6th Cir. 1968). In that case, two black school teachers had been fired. After finding the defendants liable and ordering the teachers reinstated, the court held a trial on "the issue of the compensation," noting that "the burden of proving mitigation of damages was on the defendants." 282 F. Supp. at 200. The Sixth Circuit, in affirming the monetary judgment, likewise consistently referred to it as a "damages" award. 391 F.2d at 78, 81.[16]

Given this clear, contemporaneous body of law, in an area of statutory interpretation that would obviously have been of keen interest to Congress, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment [of Title IX] to be interpreted in conformity with them." *Cannon*, 441 at 699. Then-Justice Rehnquist, joining the Court's opinion in *Cannon*, wrote specifically to underscore this point:

> the Court's opinion demonstrates that Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases such as *J.I. Case Co. v. Borak*, *supra*, and numerous cases from other federal courts, gave Congress good reason to

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[16] The United States argues that in "none of the [Title VI] cases to which the [*Cannon*] Court referred . . . did the court sustain an award of *legal* damages for a violation of Title VI." U.S. Br. 16 (emphasis in original). As for the *Rolfe* case, the U.S. simply notes that "back pay" was granted. *Id.* at 16 n.13. While true, that description is nonetheless misleading. As the quotations in text make clear, both courts in *Rolfe* plainly viewed the remedy as a conventional award of legal damages.

> think that the federal judiciary would undertake this task.

Cannon, 441 U.S. at 718 (concurring opinion) (emphasis in original). *See also Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989) ("Congress undoubtedly was aware from our cases such as *Cort v. Ash*, 422 U.S. 66 (1975), that the Court had departed from its prior standard for resolving a claim urging that an implied statutory cause of action should be recognized.").

In short, it would be unreasonable to reverse course now and not honor what appears to have been Congress's legitimate understanding about damages remedies when it enacted Title IX in 1972. As Justice Scalia remarked in the Eleventh Amendment context, "Congress has enacted many statutes . . . on the assumption that States were immune from suits by individuals. Even if we were now to find that assumption to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed." *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 496 (1987) (concurring opinion).

B. The views of the Department of Health, Education & Welfare, which was the agency responsible for administering the statute (and has now been succeeded by the Department of Education), also support our reading of congressional intent. HEW's initial regulations, still in effect, provide that "[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination." 34 C.F.R. § 106.3(a). There is no limit on this omnibus remedial authority and its express reference to remedying the "*effects*" of discrimination certainly brings to mind monetary relief. In accord with

that view, HEW sometimes required such relief in administrative proceedings under Title IX. *See, e.g.*, Respondent's Appendix in *North Haven School Dist. v. Bell*, *supra*, at 34 ("[r]eimbursement of [complainant] for any loss of salary or other benefits"); *Romeo Community Schools v. U.S. Dep't of H.E.W.*, 600 F.2d 581, 583 (6th Cir.) ("reimburse and adjust the salaries and retirement credits of any employees who had not been permitted to use accrued sick leave while on pregnancy related leave"), *cert. denied*, 444 U.S. 972 (1979). The Department's interpretation thus reinforces the conclusion that Congress intended to allow for monetary remedies.

C. Finally, the suggestion that Congress intended to allow the federal courts to issue injunctions and back pay remedies but no other monetary relief under Title IX (*see* U.S. Br. at 15-20) simply makes no sense. Injunctions, as an historical rule, are the *dis*favored remedy. And back pay would appear to be the least likely monetary remedy to find in a statute intended primarily to protect *students* from discrimination. Back pay, moreover, though at times denominated "equitable" for Seventh Amendment purposes, is nonetheless substantively equivalent to other kinds of compensatory damages.

1. *Cannon* makes clear that Title IX allows a federal court to impose injunctions on public or private schools, requiring them, *inter alia*, to accept applicants who have been excluded because of their sex. 441 U.S. at 705. Throughout the history of Anglo-American law, that kind of judicial relief, because of its intrusiveness, has generally been deemed appropriate *only* when damages cannot provide an adequate remedy. *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 502-04 (1974). For education programs, in particular, the dislocations caused by injunctive remedies may be great, sometimes raising sensitive issues of academic freedom. *See Cannon*, 441 U.S. at 747 (Powell, J., dissenting). Compliance with such injunctions can also be very expensive. *See, e.g., Missouri v.*

Jenkins, 491 U.S. 274 (1989) (school desegregation remedy). Thus, the suggestion that Congress wanted to allow injunctive remedies and *not* damages appears doubtful at best. *Cf. also* 28 U.S.C. § 1341 (prohibiting federal injunctions against state and local taxes); 28 U.S.C. § 1342 (limiting injunctions against regulated utilities); 28 U.S.C. § 2283 (prohibiting federal injunctions against state court proceedings).[17]

2. Even if the allowance of injunctive but not compensatory relief could be defended under Title IX, as it has been in other contexts (*see, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974) (Eleventh Amendment allows only prospective relief)), there are several reasons to conclude that Congress did not authorize back pay awards under Title IX while simultaneously barring all other monetary remedies. First, there has never been any question that Title IX applies to students, whereas its applicability to employees has been hotly disputed. *Compare North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), *with id.* at 504 (Powell, J., dissenting). Yet, under the United States's view, Congress wanted to leave students without a compensatory remedy, while affording back pay to school employees. That conclusion is doubly irrational, in fact, because Congress had already granted school teachers a back pay remedy for employment discrimination under Title VII.

Moreover, although the distinction between back pay and other forms of monetary relief may have *historical* significance in terms of the right to a jury trial under the Seventh Amendment, it has little, if any, substantive

[17] The Eleventh Circuit's observation that a federal grantee may escape the effects of such costly and intrusive injunctive remedies (Pet. App. 10) is more illusory than real. Aside from the fact that most schools are heavily dependent on federal funding, including the funds received for student financial aid, an injunction designed to remedy discrimination that occurred when the grantee was receiving funds may not be so easy to undo prospectively.

importance. Back pay is simply a form of compensation for one kind of harm that an individual suffers because of discrimination. Other harms are likewise caused by discrimination and they too are also amenable to redress through compensation. Not surprisingly, therefore, this Court has frequently considered back pay to be a "damages" remedy. *See, e.g., Davis v. Passman*, 442 U.S. at 231 ("damages in the form of back pay"); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 233 (1982) (back pay claimant required to "minimize his damages").

Indeed, even in the Seventh Amendment context, the Court recently described "back pay" as "compensatory damages" and held that a suit seeking such relief against a union for violating its duty of fair representation should be tried to a jury. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1347 (1990). The Court further indicated that the different treatment for back pay under Title VII was at least in part due to the fact "Congress specifically categorized backpay under Title VII as a form of 'equitable relief.'" *Id.* at 1348 (quoting 42 U.S.C. § 2000e-5(g)). In these circumstances, the conclusion that Congress intended to draw a distinct line between a back pay remedy and other forms of monetary relief under Title IX implausibly exalts form over substance.[18]

[18] The United States suggests that "[a]n award of damages is different from an equitable make whole remedy because the latter remedy merely requires the [defendant] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it [acted in accordance with the statute]. *Burlington School Comm. v. Department of Educ.*, 471 U.S. 359, 370-371 (1985)." U.S. Br. at 19 n.17 (brackets in original). But the distinction is misguided and plainly not supported by the case cited. A true equitable, restitutionary remedy is one where the defendant actually gets a windfall by retaining money that belongs to the plaintiffs, such as "[a]n action for disgorgement of improper profits." *Tull v. United States*, 481 U.S. 412, 424 (1987). Likewise, in the *Burlington School* case, relied on by the United States, the local school board *retained* money that it was obligated

3. The United States offers several reasons why it believes that Congress intended to limit monetary relief under Title IX to injunctions and back pay. These arguments are not only unpersuasive but, by and large, have already been rejected. To begin with, the United States argues that "[i]t is entirely consistent with th[e] language [of Title IX] to limit the implied remedies available to a private party to those necessary (1) to restore a plaintiff who has been wrongfully excluded from a federally assisted program to full participation, (2) to reverse any denial of benefits and to restore any benefits wrongfully withheld, and (3) to eliminate unlawful discrimination." U.S. Br. at 15-16. While obviously designed to reflect the decisions in *Cannon* and *Darrone*—but no more—this assertion nevertheless *supports* a damages remedy. In its absence, there is simply no way "to restore" the "wrongfully withheld" benefit of having participated in an educational program free of sexual harassment.

The United States next claims that it would create an "anomaly" to interpret Title IX to provide for damages (beyond back pay) in employment cases, because Title VI exempts most employment cases, thus requiring a plaintiff to proceed under Title VII instead. As a result, concludes the United States, female employees would have a greater range of remedies than their black co-workers. U.S. Br. at 17-18. But that argument was already rejected when this Court ruled that Title IX, unlike Title VI, fully applies to employment discrimination. *North Haven Bd. of Educ. v. Bell*, *supra*. Indeed, in response to the assertion that Congress was unlikely to have pro-

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by federal law to pay to plaintiff. In a back pay case, by contrast, the defendant typically gets no windfall because it has paid the wages to another employee who has been hired or promoted instead of the plaintiff. Thus, while the Court has at times described back pay as a pure restitutionary award (*see, e.g., Bowen v. Massachusetts*, 487 U.S. at 894-95), that characterization appears to be overstated. *See id.* at 913-14 (Scalia, J., dissenting).

vided "a new 'remedy' for sex discrimination in employment, but did not make that remedy available to those discriminated against on the basis of race" (456 U.S. at 554 (dissenting opinion)), the Court simply noted that "this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination." *Id.* at 535 n.26 (citing cases). *See also Darrone*, 465 U.S. at 631-34 (§ 504, like Title IX, contains broader employment coverage than Title VII).[19]

The United States further argues that the purpose of Title IX would be undermined by a damages remedy because "[t]he fundamental purpose of federal assistance is to make additional funds available for educational programs." U.S. Br. at 18. Pointing to the statute's funding cutoff provision, in particular, the United States asserts that "[t]he evident purpose of this scheme is to secure compliance with the statute without unnecessarily diverting resources from educational programs to litigation." *Id.* at 20. That argument was rejected in *Cannon*, 441 U.S. at 709, and is also flatly inconsistent with *Darrone*. Although Congress obviously wants federal funds to be spent on education, not litigation, its first priorities under Title IX are to "avoid the use of federal resources to support discriminatory practices . . . [and] to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 704.

A damages remedy is not merely consistent with—but actually *best* suited to accomplish—both of those statutory goals. Since a funding cutoff is such an extreme remedy, it is rarely, if ever, likely to be used. *Id.* at 705. Thus, if schools "faced only the prospect of an injunctive order, they would have little incentive to shun practices of

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[19] An employment discrimination claim under Title IX or Section 504, unlike one under Title VII, does not require administrative exhaustion and is subject to a longer statute of limitations. *See, e.g., Andrews v. Consolidated Rail Corp.*, 831 F.2d 678, 683-84 (7th Cir. 1987).

dubious legality." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Moreover, for individuals like petitioner, who have already suffered injury because of discrimination prohibited by Title IX, the choice is either "damages or nothing." *Davis v. Passman*, 442 U.S. at 245. Without a damages remedy, therefore, such individuals cannot receive the "effective protection" that Congress intended to provide them under Title IX. *See also Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 731-32 (1989) ("[i]n the context of the application of § 1981 and § 1982 to private actors, we 'had little choice but to hold that aggrieved individuals could enforce this prohibition, *for there existed no other remedy to address such violations of the statute.*'" (quoting *Cannon*, 441 U.S. at 728 (White, J., dissenting)) (emphasis added by *Jett* Court). To ensure Title IX's effectiveness likewise requires authorization of a damages remedy.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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QUESTION PRESENTED

Whether this Court's holding in *Cannon v. University of Chicago*, 441 U.S. 677 (1979) should be broadened so that a participant in a federally assisted educational program who has alleged an intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (1988), may obtain not only equitable relief, but recover compensatory, general and punitive damages as well?

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IN THE

Supreme Court of the United States

October Term, 1991

No. 90-918

CHRISTINE FRANKLIN,

Petitioner,

vs.

GWINNETT COUNTY SCHOOL DISTRICT and
DR. WILLIAM PRESCOTT,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit**

BRIEF FOR RESPONDENTS

STATEMENT OF CASE

This case concerns the scope of the remedy available to a victim of sex discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. Respondents have but three qualfications to make to Petitioner's summary of the facts and proceedings below.[1]

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[1]Due to the disposition of this case below on a motion to dismiss, the preparation of a joint appendix was unnecessary. Respondents will cite to the Appendix contained in Franklin's Petition for a Writ of Certiorari when they refer to the decisions of the Eleventh Circuit or the Northern District of Georgia. References to the complaint, which was the sub-

First, although the underlying charge made by the Petitioner in her complaint alleged a pattern of sexual harassment, the details — as disturbing as they are — have no analytical or substantive significance for the resolution of the legal issue presented.

Second, although Petitioner originally demanded injunctive relief prohibiting the school system and its employees from "harassing or intimidating" her, Comp. para. 57, she abandoned that request when Respondents filed their motion to dismiss.[2] Respondents suggest, therefore, that certain factual and remedial matters are out of the case: (1) As a result of actions taken by the Gwinnett County School System after April 1, 1988, including actions taken in response to the investigation by the Office for Civil Rights of the Department of Education, Petitioner's educational environment was effectively purged of any continuing effects of the sex discrimination that Petitioner may have suffered; (2) If Petitioner experienced any educational detriment necessitating remedial instruction or emotional counseling — both of which would be within the ambit of equitable relief — no such detriment was alleged or equitable relief sought. To the extent that Petitioner seeks damages, the purpose of such a recovery would be something other than

ject of the dismissal order now before this Court for review, will be to the appropriate paragraph number or, in the case of the compliance letter issued by the Office for Civil Rights on December 14, 1988, to the appropriate page in the letter. The Solicitor General advised Respondents that a copy of the complaint in this case has been lodged with the Clerk.

[2]In her order of May 1, 1989, dismissing the complaint in this case, Judge Orinda D. Evans noted that "[p]laintiff argues that the only real issue before the court is whether compensatory relief is available." Pet. App. at 17. This concession came in response to a suggestion of mootness, Pet. App. at 16-17, prompted by the resignation of the accused coach and the school system's implementation of a grievance system to receive and consider student complaints about sexual harassment and other Title IX issues. Ex. A at 8-9.

restoration to an educational environment free of sex discrimination or its lingering effects.[3]

Third, in discussing the remedy sought under Title IX, the Petitioner refers to "damages", "compensatory damages", "compensatory remedy", "compensatory relief", "monetary relief", "all appropriate, traditional forms of judicial relief" and "the usual remedy of damages" to describe what is at stake. The Petitioner's complaint, in fact, asks for "compensatory, general and punitive damages. . . ." Comp. para. 57. Each of these categories, but particularly punitive damages, is discrete, with different remedial objectives, different measures of damages and differing, frequently hard-to-predict, effects on the educational institutions subject to ultimate liability under Title IX. Respondents emphasize this point because of the Petitioner's fundamental assumption that remedies for federal statutory violations, apart from addressing the interests of a plaintiff, are otherwise of such limited consequence that Congress commonly leaves questions of remedial content and scope to the courts.

SUMMARY OF ARGUMENT

If the allegations in her complaint are proven, Petitioner would be entitled only to equitable relief under Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.* Title IX makes no reference to a private judicial right to recover the compensatory, general and punitive damages that Petitioner requests in this case. Petitioner has the burden of establishing a statutory basis for the recovery she seeks in

[3]Damages could compensate for economic loss or wounded feelings or they could serve to punish the Respondents for misconduct of an aggravated nature. The jury would determine all awards. However once the jury awards damages, there is no assurance that any of it must be spent to promote a successful Title IX plaintiff's future education.

this case, *Bell v. Hood*, 327 U.S. 678 (1946) notwithstanding. Because the plain meaning of the text of Title IX does not authorize a damages remedy, this Court should not read such a remedy into the statute. Not only is Title IX silent on the remedy Petitioner seeks, the legislative history is silent as well except for a single reference to a defeated proposal for equitable relief advanced during the debate over the enactment of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). Established law in 1964 and in 1972 generally precluded monetary liability against state and local governments and it is highly unlikely that Congress would have overturned such settled precedent without mention in floor debate. Moreover, equitable relief is more appropriate than damages to accomplish the dual objective of the federal role in education: (1) fostering learning and (2) eliminating discrimination based on sex, race and other impermissible factors in the school environment. Equitable relief seeks to promote compliance and to maintain institutional relationships; damages function primarily to punish and tend to stimulate institutional resistance. Respondents ask the Court to reject Petitioner's argument to extend *Cannon v. University of Chicago*, 441 U.S. 677 (1979).

ARGUMENT

I. Introduction

Petitioner asks this Court to enlarge upon its ruling in *Cannon* and declare that a participant in, or beneficiary of, a federally assisted program has under Title IX a right to recover "compensatory, general and punitive damages." Title IX is one of several congressional enactments based on the conditional spending power.[4] All such enactments trace their origins to the anti-

[4]Other legislation includes § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U.S.C. § 794 (1988); § 601 of the Civil Rights Act of 1964,

discrimination provisioins of Title VI of the Civil Rights Act of 1964.[5] In the twenty-seven years since the passage of Title VI, this Court has never interpreted the anti-discrimination provisions of any of those statutes to support a recovery for the range of monetary damages that the Petitioner now seeks.

For reasons that will be developed in greater detail, Respondents believe that Petitioner asks for a more extensive change in the law than her argument — with its incrementalist rhetoric — tends to convey. To illustrate, Petitioner wants this Court to authorize monetary remedies under Title IX that she could not secure under 42 U.S.C. § 1983, a statute that directly applies to this case and allows the full panoply of common law damages remedies.[6] Beyond that, Petitioner

78 Stat. 452; 42 U.S.C. § 2000d (1988). The interrelatedness of these statutory schemes is a key theme in this Court's decisions. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). Indeed, the decisions in both *Cannon* and *Guardians Ass'n* regarded the legislative history of Title VI of the Civil Rights Act of 1964 to be pivotal to an understanding of the rationale and scope of all contemporary anti-discrimination legislation based on the conditional spending power.

[5]78 Stat. 452, 42 U.S.C. § 2000d (1988).

[6]To grasp the full dimensions of what Petitioner wants as a Title IX remedy, consider how the present case would be analyzed if brought under 42 U.S.C. § 1983. Note the doctrinal barriers that the Title IX theory seeks to evade:

(1) The recovery of punitive damages against the school district would be foreclosed because of this Court's decisions in *City of Newport v. Facts Concert, Inc.*, 453 U.S. 247 (1981).

(2) To the extent that Petitioner's complaint suggests reliance on *respondeat superior* theory, that theory is also foreclosed against the school district by this Court's decision in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

(3) To have any hope of establishing governmental entity liability against the school district, Petitioner would have to show an official policy condoning or tolerating sexual harassment and further show that the policy

asks the Court to minimize the significance of statutory silence under Title IX on two relevant levels — both on the question of right as well as the question of remedy. The question of implied right having been settled in *Cannon*, Petitioner argues that her burden of proof concerning intent has been discharged. From this vantage point of analytical strength, Petitioner would bypass the vexing problem of second level statutory silence on implied remedy by ***presuming*** under *Bell v. Hood* that Congress routinely expects the full panoply of common law damage remedies to be available to enforce all implied rights of action.[7] A defendant faced with this formidable presumption can avoid damages liability only if congressional intent to limit the remedy is demonstrated — a seemingly impossible task that makes the Petitioner's presumption rebuttable in theory though not in fact.[8] Respondents hope to show

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was fashioned by a final decisionmaker at the policy making level within the school district. *City of Canton v. Harris*, 489 U.S. 378 (1989); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). On this point, if Respondents read the Title IX complaint correctly, it does not appear to implicate any school official in the school district higher than the principal of North Gwinnett County High School. Recently decided and, in Respondents' view, well considered circuit court decisions suggest strongly that Petitioner would fail if she proceeded against the Respondent school district under section 1983. *See, e.g., Thelma D. by Delores A. v. Board of Educ.*, 934 F.2d 929 (8th Cir. 1991); *D.T. by M.T. v. Independent Sch. Dist. No. 16*, 894 F.2d 1176 (10th Cir. 1990); *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989); *Spann by Spann v. Tyler Indep. Sch. Distr.*, 876 F.2d 437 (5th Cir. 1989).

Finally, for the record, Petitioner did bring a § 1983 action in state court *after* the adverse ruling in the District Court on her Title IX claim. The § 1983 claim was dismissed on res judicata grounds. *Franklin v. Gwinnett County Pub. Schs.*, ____ S.E.2d ____, 1991 WL 155140 (Ga. App. 1991).

[7]In this regard, Petitioner also relies on *J.I. Case v. Borak*, 377 U.S. 426 (1974).

[8]Since Congress never debated, much less legislated, with respect to either of these issues in connection with the adoption of Title IX or its

that Petitioner's arguments are ahistorical, unreasonable and without a sound appreciation for the constraints on statutory interpretation that flow from the plain meaning of language, the requirement of fair notice to all who are subject to regulation and the concept of separation of powers.

Although some of the arguments to be advanced on Respondents' behalf would challenge the premise of the implied right of action cases generally, Respondents do not ask the Court to abandon *Cannon*. They ask rather that the remedy available to successful Title IX plaintiffs be limited to equitable relief. The purpose of this relief would be to restore such plaintiffs to the status within the educational program they would have achieved had the discrimination never taken place. Respondents' contend that equitable relief: (1) is as effective, if not more effective, than a damages remedy in eliminating sex discrimination; (2) strikes a better balance between the dual goals of funding education and trying to prevent sex discrimination in the schools; (3) costs less than the damages remedy; and (4) does not engender the siege mentality that can arise in cases in which a substantial damages claim is made. In making these points, Respondents do not intimate that general policy analysis should decide this case. Rather, these reasons offer powerful support to what ought to be a straightforward question of statutory interpretation.

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direct antecedent, Title VI, how likely is it that a defendant could meet the burden of proof that the Petitioner describes? The probability, of course, is quite low which is why the burden of shifting argument is so attractive from the Petitioner's perspective. Without this analytial construct, the Petitioner's case lacks pretense because Petitioner cannot cite statutory text to support her request for an implied damages remedy.

II. Neither the Text Nor the Structure of Title IX Authorizes A Private Right of Action to Recover Compensatory, General or Punitive Damages.

This case presents an important question about methodology of statutory interpretation. Not content with the equitable remedy recognized in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), and reaffirmed in *Guardians Ass'n v. Civil Serv. Comm'n.*, 463 U.S. 582 (1983), and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), Petitioner asks this Court to fashion a broad right to damages under Title IX, notwithstanding total statutory silence in Title IX (and its statutory antecedent Title VI) on the subject. Petitioner seeks an interpretation of Title IX that would distort accepted standards of statutory interpretation (including legislative history). For that reason alone, it should be rejected. To the extent that Petitioner argues for broad judicial authority to formulate remedy whenever a right is found, this argument also offends the principle of separation of powers. This provides an independent basis for affirming the ruling of the Eleventh Circuit.

A. The Plain Meaning of Title IX

1. Doubts About Implied Right of Action Theory Raised by a Majority of Justices in *Cannon* Decision

When this Court recognized an implied private right of action under Title IX in *Cannon*, three Justices (White, Blackmun and Powell) dissented. For them, the argument favoring recognition of an implied private right went beyond the limits of statutory interpretation even when liberally supplemented by reference to legislative history. Justice White's dissent reviewed the 1964 congressional debate about Title VI in detail

because Title IX was premised on the Title VI ban on race, color or national origin discrimination in programs receiving federal financial assistance. 42 U.S.C. § 2000d. Justice White found that Title VI was enacted to make clear that all federal agencies had both the duty and the authority to eliminate discrimination in federally assisted programs. *Cannon*, 441 U.S. at 718-721. In his view, Title VI contemplated agency action to be the "principal mechanism" for enforcement. *Id.* at 721. To the extent that private enforcement through litigation was foreseen, Congress understood that such litigation would be against persons acting under of color of state law and would be brought under 42 U.S.C. § 1983. *Id.* 722-724.

Justice Powell accepted the reasoning of Justice White's dissent. He went further, however, to question the Court's entire approach to statutory interpretation in the implied right of action cases. He viewed the Court's role (in recognizing implied rights of action) as raising a significant separation of powers issue. *Id.* at 730-731. In this vein, Justice Powell was particularly critical of the four part test enunciated in *Cort v. Ash*, 422 U.S. 66 (1975), a test that he viewed as inviting "independent judicial lawmaking". *Id.* at 740. Indicating that he would prefer to start afresh without the trappings of *Cort*, he stated:

> Henceforth, we should not condone the implication of any private action from a federal statute absent the most compelling evidence that Congress in fact intended such an action to exist. Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created, I would be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes. *Id.* 749.

Two Justices in *Cannon* concurred in the decision to imply a private right of action under Title IX, but expressed serious

reservations about the direction of the law. Justice Rehnquist, joined by Justice Stewart, saw the implied right of action question as being one ultimately of statutory construction.[9] Although giving the benefit of the doubt to Congress' apparent assumption about the primacy of the judicial role in defining and enforcing civil rights, Justice Rehnquist made clear that the time to draw the line was at hand. Referring to Justice Stevens' concluding call for Congress to follow the "better course" of making clear its intent to create a cause of action, *Id.* at 717, Justice Rehnquist advised the "lawmaking branch of the Federal Government that the ball, so to speak, may well now be in its court." *Id.* at 718. Respondents suggest that in the present case the time has come to make the call.

2. Text, Structure and Meaning of Title IX

The language of Title IX, like its statutory antecedent Title VI, says nothing about either a private right of action or any form of monetary relief. The legislative history of Title IX, like that of Title VI, is likewise silent on those subjects. The Title IX enforcement mechanism was drawn from Title VI, and yet both contrast sharply with the judicially enforceable remedial schemes set forth in other titles of the Civil Rights Act of 1964, none of which make the common law damages remedy available.[10] From a structural standpoint, Title IX rests on the conditional spending power rather than the commerce clause and this alone suggests a less intrusive, less coercive regulatory approach. Under Title IX (and Title VI) a high premium is placed on sustaining the funding relationship and retaining the federal government's capacity to influence and persuade.

[9]This principle was upheld in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979), a case decided in the same Term as *Cannon* but after *Cannon* was announced. It was reaffirmed in *Virginia Bankshares, Inc. v. Sandberg*, ___ U.S. ___, 111 S.Ct. 2749, 2763 (1991). Respondents suggest that this principle offers a powerful antidote to Petitioner's *Bell v. Hood* presumption that ultimately is an anti-textual argument.

[10]The Civil Rights Act of 1964 establishes enforcement procedures in several titles: Public Accommodations (Title II), Public Facilities (Title III), Public Education (Title IV), Federally Assisted Programs (Title VI), and Employment (Title VII). Note that Title II, 42 U.S.C. § 2000a-3, and Title VII, 42 U.S.C. § 2000e-5, authorize equitable relief (including back pay in Title VII) in civil actions, while Title III, 42 U.S.C. § 2000b-(a), and Title IV, 42 U.S.C. § 2000c-6, permit the Attorney General to institute civil suits to "further the orderly process of desegregation."

Title VI, 42 U.S.C. § 2000d-1 mentions only administrative procedures for the cut-off of federal funds to offending programs and activities. It is silent on the issues of a private cause of action and private remedies. The Court, however, implied a private cause of action for equitable relief in *Cannon* which is at least consistent with the explicit remedies in the other titles of the Civil Rights Act of 1964. In Respondents' view it would be anomalous for the Court to interpret statutory silence in Title IX as permitting a damages remedy that would go beyond those explicitly mentioned in the source legislation.

The equitable remedy authorized in *Cannon* at least has the virtue of reinforcing the linkage between the federal government and recipients of federal financial assistance. The litigant in effect becomes an additional bargainer in an ongoing relationship between the federal agency and the educational institution. If the litigant believes that more ought to be done to comply with Title IX — namely to change institutional behavior — she can invoke the equitable authority of the district judge. The object is not to punish but to find the optimal level of Title IX compliance.

An irony of Petitioner's argument for damages under Title IX is that the intense personal vindication she seeks for herself would have little or no benefit for her classmates. Equitable relief — whether achieved by agency intervention or by court order — almost always insures that the remedial benefit to the individual benefits others. The present case is good example. Recall that the football coach and the band

teacher both left their positions at the high school. They were no longer in positions of authority from which they could exploit or intimidate female students. Recall also that the Title IX grievance procedure came as a result of the intervention of the Office of Civil Rights. Other female students in Petitioner's position in the future will now know where and how to get help.[11] Perhaps a greater irony is that if Petitioner gets the damages remedy she seeks, her personal vindication actually might diminish her classmates' protection against discrimination in the long run. Where will Petitioner and her classmates be if the costs and uncertainty of defending Title IX damage actions influence school systems to decline federal financial assistance in the years ahead?

The text, structure and established administrative oversight practice under Title IX weigh powerfully against the judicial implication of a damages remedy for Title IX violations. As will be shown, this Court's recent discussion of the methodology of statutory interpretation supports Respondent's position. Respondents do not think that it is necessary to go beyond the text of Title IX. Should the Court wish to consider legislative context, however, Respondents demonstrate elsewhere in this brief that the silence about the damages remedy during legislative debate is unanswerable. If the supporters of Title IX (and its antecedent Title VI) thought about private enforcement at all, they apparently did not think about making "compensatory, general and punitive" damages available to the successful Title IX (or Title VI) litigant.

[11]Because the compliance efforts of the school have been extensive and effective, Petitioner's request for injunctive relief probably would have been deemed moot even if it had not been abandoned. *DeFunis v. Odegaard*, 416 U.S. 312 (1973). In contrast to requests for equitable relief, damages claims are never moot. *Los Angele v. Lyons*, 461 U.S. 95 (1982). If anything, a damage claim tends to prolong litigation and to increase bitterness, particularly where the litigants had a prior institutional relationship.

3. Plain Meaning Doctrine Applied To Title IX

This Court has never suggested that interpreting statutes is a mechanical process which excludes reference to legislative history or other relevant materials. On the other hand, concern about the proper role of the judiciary in interpreting statutes has prompted the Court in recent years to give greater weight to text, structure and plain meaning. Respondents believe this trend is appropriate and that it weighs heavily against the Petitioner's burden shifting argument under *Bell v. Hood*, 327 U.S. 678 (1946).

An illuminating example of this is the Court's decision in *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989), a civil case involving the scope of impeachment under Rule 609(a) of the Federal Rules of Evidence. This case is important because it arises in an area of the law — judicial rulemaking — where the Supreme Court's institutional competence is at its greatest and where Executive and Legislative Branch deference to its expertise is substantial. 28 U.S.C. § 2076. In holding that Rule 609(a) permits impeachment by prior conviction of all witnesses in civil or criminal trials (except the *criminal* defendant) without balancing prejudice against probative value, the Court eschewed interpretive options that would have improved or perfected the rule in the eyes of its critics. As Justice Stevens observed:

> Our task in deciding this case, however, is not to fashion the rule we deem desirable but to identify the rule that Congress fashioned. We begin by considering the extent to which the text of Rule 609 answers the question before us. Concluding that the text is ambiguous with respect to civil cases, we then seek guidance from legislative history and from the rules' overall structure. *Id.* at 1984.

As unsatisfactory as the Court's reading of Rule 609(a) might

have been to some, it did come closest, among all of the interpretive possibilities, to what might be described as the plain meaning of the rule. The decision in *Green* probably would not have caused much alarm if the Court had shed its judicial mantle and revised Rule 609(a) to eliminate its significant drafting flaws. The Court, however, did not do so and the established process of amending the Federal Rules of Evidence was allowed to take its course. Now Rule 609(a) has been rewritten, hopefully for the better, but only after Congress had the opportunity to review and object as provided in 28 U.S.C. § 2076.[12]

Green is a worthy example of restraint in statutory interpretation. A reluctance to delve into every statutory drafting deficiency is not an abdication of judicial responsibility. As a practical matter, the constraints of case-by-case adjudication greatly limit what a court can do at any one time even if it wants to engage in corrective statutory interpretation. Subsequent decisions, sometimes several of them, are almost always necessary to deal with the full implications —foreseen and unforseen — of the corrective interpretation.[13] These constraints, however, do not limit the

[12]In a similar vein, see *Finley v. United States*, 490 U.S. 545 (1989), where this Court rejected an attempt to assert pendent party jurisdiction in a Federal Tort Claims Act case, 28 U.S.C. § 1346(b). As in the case of Rule 609(a), the decision in *Finley* was overturned legislatively. § 310, Judicial Improvements Act of 1990; codified at 28 U.S.C. § 1367. The point is that adhering to the normal processes of lawmaking settles questions in a way that judicial construction cannot match.

Petitioner's *Bell v. Hood* argument invites this Court to engage in an interpretative venture where its institutional capacity to make judgments is less than Congress'. In light of *Green* and *Finley*, Petitioner's argument surely cuts against the grain.

[13]When a damages remedy is recognized judicially, the following issues may well have to be resolved at some point, particularly if the liability of public officials or governmental entities is involved: (1) Does damage include a recovery for wounded feelings? Or only economic injury? (2) What is the measure of damages? (3) Are punitive damages recoverable? (4) What is the measure of punitive damages? (5) Does the damage recovery vary depending on the degree of culpability involved? (For example, disparate impact versus disparate treatment theories as discussed in *Guardians Ass'n*) (6) What immunities are applicable? (7) What is the standard for recognition of an immunity claim? (8) If the plaintiff dies before bringing suit or before judgment, does the action survive? (9) If the victim dies as a result of a discriminatory act (such as a racially or sexually motivated killing in the school environment), does the federal action survive? What law governs? (10) What statute of limitation governs? Can it be applied retroactively? and (11) When a governmental entity is sued, can it be held liable on a respondeat superior theory?

When the consequences of implying a right of action and recognizing an accompanying damages remedy are examined closely, a court must be prepared to go the long haul to address all of the *anticipatable* problems. If the remedy is limited to equitable relief, the post-recognition problems are fewer and more manageable.

legislative or formal rulemaking processes and, therefore, when either process is stirred to action, the end result may well be a statutory proposal that addresses several related problems simultaneously and does so far more effectively than a court could ever hope to do. The reasoning and result in *Green* counsel strongly against recognition of a damages remedy under Title IX in the present case.

Three cases from the 1990 Term provide additional guidance in this case. In *West Virginia Univ. Hosp. Inc. v. Casey*, ____ U.S. ____, 111 S.Ct. 1138 (1991), the issue was whether a successful section 1983 plaintiff could recover more than $100,000 in fees for experts employed in the course of litigation. This Court in a 6-3 decision concluded that such fees were not included within the term "a reasonable attorney's fee" as contemplated by 42 U.S.C. § 1988. After reviewing many *statutes* authorizing the award of fees and expenses to the prevailing party in litigation, the majority in *WVUH* found that attorney's fees and expert witness fees were routinely treated as separate items and yet were still within the same class of

litigation expenses. *Id.* at 1141-1143. The majority's analysis of *cases* discussing the fee shifting issue yielded the same conclusion. Given the common legal derivation of these related items, the absence of any express reference to expert witness fees in section 1988 was decisive to the *WVUH* holding.

In response to an argument that congressional purpose can overcome apparent deficiencies of statutory text, the Court had this response:

> The best evidence of . . . purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous — that has a clearly accepted meaning in both legislative and judicial practice — we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.
>
> . . .
>
> Congress could easily have shifted "attorney's fees and expert witness fees," or "reasonable litigation expenses," as it did in contemporaneous statutes; it chose instead to enact more restrictive language and we are bound by that restriction. *Id.* at 1147.

The lesson to be drawn from *WVUH* is that where an item is arguably missing from a statute and that missing item has a commonly understood meaning or usage, the omission will generally be treated as intentional. This is especially true in a case like *WVUH* where a provision for attorney's fees and litigation costs, including expert witness fees, is very likely to address all such interrelated questions in the same place in a statutory scheme if they are addressed at all. In *WVUH*, section 1988 was given its plain meaning even though other interpretations, based on suppositions about legislative intent or considerations of policy, were conceivable.

Under the *WVUH* approach to statutory construction, Title IX's silence on "compensatory, general and punitive" damages is highly significant. As items falling under the general subject of modes of relief or redress, one reasonably could expect these universally familiar remedies to be thought about in conjunction with the development of a general enforcement mechanism under a statute like Title IX (or Title VI). However much the Senate and the House of Representatives as deliberative bodies may hedge in the legislation that they ultimately enact, members of Congress as individuals do not actually think like they legislate. Respondents hope and believe that they think about analytically related issues in a rudimentarily integrated way. This has to be true of the question of remedy because surely every member of Congress understands that laws do not enforce themselves. Therefore, what might seem to Petitioner to be incomplete and ineffective congressional action to enforce Title IX (and Title VI) is ***nevertheless*** the product of choice. Under the reasoning of *WVUH*, legislative choice is to be respected not because courts think that the choice is the best or even a good one,[14] but because courts regard statutory text as the most revealing indicator of legislative intent.

In the other two significant statutory interpretation cases decided in the 1990 Term, the Court dealt with the unforseeable consequences of implying a private right of action.

In *Virginia Bankshares, Inc. v. Sandberg*, ____ U.S. ____, 111 S.Ct. 2749 (1991), the plaintiff sued on an implied right

[14]In *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), this Court found that regulating one step at a time might well be the preferred legislative approach in a given field. Surely, this approach could make sense in the specific area of remedies where the cost of securing compliance with legislative rules is often hard to predict and the potential for subversion of legislative objectives is potentially significant. The *Bell v. Hood* burden shifting argument collides with the reasoning in this Court's rational basis cases.

of action pursuant to *J.I. Case v. Borak*, 377 U.S. 426 (1964) for what she alleged was a misleading proxy solicitation under section 14(a) of the Securities Exchange Act of 1934. 15 U.S.C. § 78n(a). Because the plaintiff was among a group of minority stockholders whose support was not essential to the effectuation of a merger, the Court in a 5-4 ruling (in the relevant part of the opinion) rejected the attempt to bring the action. Justice Souter noted that the plaintiff's theory of recovery, if recognized, would expand the class of potential plaintiffs under *Borak* to a significant extent. Although recognizing that the answer to the plaintiff's argument rested ultimately on an assessment of congressional intent,[15] he observed:

> [T]he corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended. *Id.* 111 S.Ct. at 2763.

Justice Souter's brief examination of the traditional materials of legislative history led him to characterize the congressional expression of intent on the scope of section 14(a) as "reticent". In this vein, he noted the troubling fact that Congress was silent about an implied right of action under section 14(a) yet created express causes of actions in three closely related sections of the same Act — §§ 9(e), 16(b) and 18(a). *Id.* at 2764. At this point in *Virginia Bankshares* the inquiry might well have come to an end but for the majority's willingness to consider the issue of equality of status among all section

[15]Justice Souter cited *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and noted that it affirmed the primacy of inquiry into legislative intent to determine whether to imply a right of action. He did not address the burden of proof issue explicitly at that point, but a fair reading of *Virginia Bankshares, Inc. v. Sandberg*, ___ U.S. ___, 111 S.Ct. 2749, 2763-2766 (1991) suggests that the burden is on the proponent of expansion of an implied right of action or related remedy. The implications for Petitioner's *Bell v. Hood* burden shifting argument should be ominous.

14(a) implied right of action claimants.[16] Working within the existing framework of implied right of action precedent, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the majority looked to "policy" considerations to judge whether the class of potential section 14(a) plaintiffs ought in fairness to be broadened. On balance, the undesirable consequences of expanding the section 14(a) right of action to include minority shareholders persuaded the majority to leave the law as it stood. The plaintiff therefore did not meet the burden to justify a change in the law.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, ___ U.S. ___, 111 S.Ct. 2773 (1991), the Court had to decide the appropriate statute of limitation for an implied right of action under section 10(b) of the Securities Exchange Act of 1934. When a federal statute is silent on limitation period, the Court's usual practice has been to borrow the most analogous *state* statute of limitation. In *Gilbertson*, however, the Court elected to borrow a statute of limitation from one of the other provisions of the 1934 Act.[17] In discussing its rationale, the Court, *per* Justice Blackmun, dismissed the pretense that Congress ever intended to provide the implied

[16]Justice Souter's structural reasoning, based on the presence of express causes of action elsewhere in the 1934 Act, weighed against the implication of a right of action under section 14(a) in the first place. In this respect, the analytical approach parallels that taken by the majority in *WVUH* and the inference, based on the absence of an express cause of action in section 14(a), also would be the same.

[17]This again is an example of structural reasonsing. The Court looks to functionally related *federal* statutes and examines their limitation periods. In filling out the details of an implied right of action, this methodology, in Respondents' view, is superior to an inquiry into legislative intent. Respondents suggest that if the *Gilbertson* analysis had been applied in evaluating the implied right of action claim in the first place, a legislative solution to the problem would have been forthcoming if one was needed.

remedy. *Id.* at 2780. It also noted in passing how "awkward" it was to try to discern the statute of limitation that "Congress intended courts to apply to a cause of action that it really never knew existed." *Id.*[18]

Yet faced with almost half a century under a remedial scheme of the judiciary's own creation, this Court plainly had no choice in *Gilbertson* but to attempt to tidy up what even two dissenters described as "the often chaotic traditional approach of looking to the analogous state limitation". *Id.* at 2787 (Justice Stevens dissenting, joined by Justice Souter). In *Gilbertson*, there was a note of weariness at having to deal with an issue that would have been settled long ago had Congress legislated and the judiciary refrained. In this respect, *Gilbertson* shares common ground with *Virginia Bankshares*. Neither opinion is a celebration of the virtues of the implied right of action methodology.

In the context of the present case, the lesson to be drawn from *Gilbertson* and *Virginia Bankshares* is evident. Petitioner's demand for the ***judicial expansion*** of remedies under Title IX ought to be rejected with the understanding that nothing beyond equitable relief of the type sought in *Cannon* and *Darrone* will be available in the future. If the actual holding in *Bell v. Hood* (as opposed to what some suggest it means) even faintly suggested a universal presumption in favor of common law damages whenever a federal statute is silent on the subject of remedy, Respondents would ask the Court to overrule that decision. As framed by petitioner, the *Bell v. Hood*

[18]Justice Blackmun was joined in these views by Chief Justice Rehnquist and Justices White, Marshall and Scalia. It would appear that Justices O'Connor and Kennedy agreed with all that Justice Blackmun wrote about implied rights of action and the problems they can spawn; their dissents were prompted by the brevity of the three year federal statute of limitation chosen by the majority (not subject to equitable tolling), *Id.* at 2788-2790, and by its retroactive application to the case at hand. *Id.* at 2785-2788.

presumption is an invention.[18a] The present case offers the occasion to cast it aside.

In a society as intensively regulated as this one, legislative bodies at the national and state levels spend a significant amount of time considering methods of enforcing statutory mandates, including whether to employ: (1) traditional legal and equitable remedies and private enforcement; (2) a remedial scheme that relies on combined private and public enforcement but with less emphasis on the traditional array of common law remedies; or (3) an enforcement scheme predominantly, if not exclusively, under government control. The statutes summarized in Appendix A of this brief offer an insight into the array of enforcement approaches and remedial choices that Congress has enacted into law over the past 30 years. They are varied, sometimes complex; they do *not* routinely include the common law array of damage remedies.

As a corpus of law, however, modern regulatory statutes reflect recognition of the fact that the economic, social and political ramifications of remedial choice can be great. For that compelling reason alone, one can readily understand how lawmakers, who might agree generally about the desirability of a particular political end, can disagree — sometimes vehemently — about the most effective means of bringing it about. If statutes are seemingly incomplete because lawmakers deadlock over enforcement issues, it does not follow that these same lawmakers silently (but consciously) delegate to the judicial branch both the freedom and the responsibility to fill in all the seemingly unresolved details. The *Bell v. Hood* presumption cannot be based on a theory of how legislators actually behave. It is a theory that enables a class of litigants

[18a]In Part III-B of this Brief, Respondents discuss why, in 1964 and in 1972, the presumption would have run counter to a well understood body of immunities law making damages generally unavailable.

to try to turn disappointment or defeat in the legislative process into victory in the courts.

Petitioner's reading of *Bell v. Hood* has extraordinary implications for statutory interpretation. If accepted by this Court, it would invert the respective roles of the Legislative and Judicial Branches in our constitutional structure. The power to establish rights and to create an adequate enforcement mechanism lies with Congress. Likewise, the power to refine, revise and correct defective legislation also lies with Congress. This Court's obligation is to enforce the law as it is written, particularly in the realm of remedial choice which is probably the most political part of the legislative process. Respondents ask this court to reject the argument that Title IX authorizes the recovery of compensatory, general or punitive damages. It is unsupported by the text or structure of Title IX.

B. Recognition of a Damages Remedy Under Title IX in the Face of Statutory Silence Would Undermine Separation of Powers Values Counseling Judicial Respect for Legislative and Executive Branch Primacy in the Formulation of Rights and Remedies

Respondents' arguments for limiting Title IX relief to equitable remedies draws powerful support from separation of powers theory. If the *Bell v. Hood* burden shifting presumption is seen as a silent delegation of legislative authority to the Judicial Branch in the area of formulation of remedy, the premise of *Bell v. Hood* cannot stand. If the Petitioner is shorn of this presumption, then Petitioner — not Respondents — will have to overcome the formidable hurdle of total legislative silence on the question of a Title IX damages remedy. It is a burden that in fairness ought to rest on Petitioner since she seeks to change what was settled law in 1964, if not in 1972

when Title IX was passed.[19] It is a burden that Petitioner does not seem eager to assume.

In two recent decisions, this Court addressed separation of powers challenges involving congressional delegations of power to officials in the Executive and Judicial Branches of government. In *United States v. Touby*, ____ U.S. ____, 111 S.Ct. 1752 (1991), the Court rejected a challenge to a statutory delegation of temporary authority to the Attorney General to add new drugs to (or reclassify within) the schedule of controlled substances banned under the Controlled Substances Act. *Id.* at 1754. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court rejected a challenge to the Sentencing Reform Act of 1984. The attack was that the Act delegated broad power to a commission within the Judicial Branch to formulate sentencing guidelines ultimately intended to be binding on the federal courts. In both cases, the Court examined the powers actually delegated and the legislative standards governing their execution. It upheld both statutes reasoning in relevant part that:

> So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *United States v. Touby*, ____ U.S. ____, 111 S.Ct. 1752, 1756 (1991), quoting from *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). *See also Mistretta v. United States*, 488 U.S. 361, 372 (1989).

If the *Bell v. Hood* presumption can be conceived as a silent delegation to the Judicial Branch of legislative authority to formulate remedy, Respondents would insist further that it must

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[19] In *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 109 S.Ct. 1981 (1989), the Court noted the principle that, "[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Id.* at 1991. The status of settled law as of 1964 and 1972 is developed in Part III-B of this brief.

also be seen as a *standardless* delegation. The Supreme Court and all lower federal courts are courts of limited jurisdiction. They exercise the authority that the Constitution permits them if and when Congress invokes that authority. Petitioner cannot identify any "intelligible principle" undergirding the *Bell v. Hood* silent delegation of remedial authority. While common law courts of general jurisdiction may have exercised such lawmaking discretion within the realm of the ever shrinking body of common law doctrine, federal courts have functioned under a different set of institutional constraints. *Bell v. Hood's* mythic status in the law should be brought to an end.

A further separation of powers implication of the Petitioner's argument arises from an examination of the Presentment Clause of Article I, Section 7, Clause 2.[20] One consequence of implying a damages remedy nineteen years after the passage of Title IX (and twenty seven years after Title VI) is to deprive the President of the United States of the constitutional right to participate in the lawmaking process. As Respondents have emphasized throughout this brief, the formulation of remedy is inherently political in nature. Even if Congress can agree on the nature of the legal right to be protected, debate over the manner and means of compliance is as important as debate about the underlying right itself. Indeed, the two cannot be separated in a practical sense even though they arguably might be differentiated in other ways. *See Davis v. Passman*, 442 U.S. 228, 239 (1979).

Would President Nixon have signed Title IX into law in 1972 if a provision for compensatory, general and punitive damages had been written into it? Would Title IX have passed Congress in that form? Or even Title VI in 1964? Petitioner's

[20] *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, ___ U.S. ___. 111 S.Ct. 2298, 2311 (1991); *I.N.S. v. Chadha*, 462 U.S. 919, 944-948 (1983).

burden shifting argument ignores the presidential role in the lawmaking process. In Respondents' view this is a serious flaw. In evaluating the Petitioner's argument generally, we invite the Court's attention to the debate over the Civil Rights Act of 1990, (S. 2104; 101st Cong. 1st Sess). One of the central issues in that debate was Section 8 of the bill which proposed amendment of Section 706(g) of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5(g)) to allow both ***compensatory*** and ***punitive*** damages against the employer. In his Veto Message of October 22, 1990, President Bush cited the radical alteration of the remedial provisions of Title VII of the Civil Rights Act of 1964.[21] The veto was sustained.

The point is that a President's views on legislation have a bearing on the final product which he must reject or accept as a whole. If the Judicial Branch gives an interpretation to a statute not reasonably drawn from its language, the interpretation undermines the presidential role in lawmaking and exposes those who rely on the statutory language to obligations that could not fairly be anticipated. The Executive Branch, of course, has a major role in Title IX enforcement. A damages remedy, if recognized, will have a significant effect on Executive Branch enforcement capability. The right to recover damages is about as fundamental a statutory right as there is. If it is not written into the statute, the Judicial Branch should not recognize such a right by interpretation. The debate in Congress over the issue[22] now before this Court ought to give serious pause about Petitioner's argument.

[21] Message from the President of the United States, Veto - S. 2104, Civil Rights Act of 1990, p. 2 (October 22, 1990).

[22] The Civil Rights and Women's Equity in Employment Act of 1991, H.R. 1 passed the House of Representatives on June 5, 1991. Section 106 authorizes ***compensatory*** and ***punitive*** damages for intentional discrimination. These issues would be tried by a jury if either party makes a demand. The award of punitive damages is subject to a cap of $150,000 or the sum of compensatory damages plus back pay depending upon which amount is greater.

III. Nothing in the Legislative History of Title IX or Title VI Supports the Remedy of Compensatory, General or Punitive Damages

Petitioner's preferred ground for reversal of the Eleventh Circuit decision in this case is the *Bell v. Hood* burden shifting argument. As a fall back argument, Petitioner makes an argument based on legtislative intent. By addressing this argument, Respondents do not concede that resort to legislative history is a preferred means or, in the context of this case, even a useful guide for settling what is an uncomplicated question of statutory construction. No doubt Petitioner would have developed the legislative history argument more forcefully (and as her primary basis for reversal) if any persuasive evidence of congressional intent existed. Respondents will show, however, that the only evidence from legislative history concerning remedy under Title IX comes from the debate surrounding the enactment of its direct statutory antecedent Title VI. This evidence undercuts the Petitioner's position.

A. Legislative Debate Concerning Remedy

In *Cannon* and *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), the litigants had considerable incentive to bring out any facet of the legislative debate surrounding the enactment of Titles IX and Title VI suggesting — even obliquely — the propriety of private enforcement through a damages remedy. If such evidence existed, it would have made *Cannon* an easy case for the Court and *Guardians Ass'n* perhaps a less divisive one. But the reality is that the legislative history of Titles VI and Title IX — as developed in the *Cannon* and *Guardians Ass'n* opinions — reveals little about an implied right of action and *almost* nothing about the further and more consequential issue of an implied damages remedy.

The lone exception to an otherwise opaque legislative record on remedy in 1964 was the proposal by Senators Keating and Ribicoff to establish a private right to enforce Title VI using the injunctive mechanism.[23]

The Senate, however, did not accept this proposal. In Respondents' view, Congress most plausibly intended for funds termination to be the exclusive enforcement mechanism under Title VI (thereby precluding any implied private right to sue for either equitable relief or damages). Although rejected by this Court's rulings in *Cannon* and *Guardians Ass'n*, the argument nevertheless retains force in the context of this case. The Keating-Ribicoff proposal indicates the outer limit of the congressional debate on private enforcement of Title VI[24] Not one word appears to have been uttered by any member of the Senate or the House of Representatives referring to compensatory, general or punitive damages as a possible remedy for Title VI violations. In the face of this silence, one cannot convincingly argue that a majority of Congress (or

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[23]The Keating-Ribicoff proposal was discussed in some detail in Justice White's opinion in *Guardians Ass'n*, 463 U.S. at 600-601.

[24]In fact, much of Jusstice White's opinion in *Guardians Ass'n* was devoted to the significance of Title VI as conditional spending power legislation and to factors limiting successful Title VI plaintiffs to prospective relief only. *Guardians Ass'n v.Civil Serv. Comm'n*, 463 U.S. 582, 595-603 (1983). The facts in *Guardians Ass'n* showed discriminatory impact and not intentional discrimination. The opinion is problematic, however, because it suggests — though it does not and could not hold — that a compensatory remedy might be available where an intentional violation of Title VI is proven. In Respondents' view, Justice White's discussion of prospective relief under Title VI (and by extension Title IX) is persuasive and should apply to all violations intentional or otherwise. Why this discussion ultimately came to the tentative conclusion that prospective relief might be inadequate in cases of intentional discrimination is hard to reconcile with the fact that equitable relief was in 1964 and had been for some time the only remedy used in school desegregation cases throughout much of the nation.

even a single member) consciously desired, much less actively considered, the damages remedy Petitioner now seeks. As far as Respondents have been able to determine, the legislative debate accompanying the passage of Title IX in 1972 did not alter or expand the historical record. The text, structure and apparent meaning of Title IX is drawn entirely from Title VI and is coextensive in scope with it. The case for an implied damages remedy under Title IX thus cannot rest on legislative history.[25]

B. Presumption that Congress Knows Existing Law

Petitioner's legislative intent argument builds on the fiction that the state of the law concerning remedies for statutory violations was so well understood in 1964 and in 1972 that Congress assumed its applicability to the Title VI and Title IX regulatory schemes. In other words, Congress was silent on both the existence of a private right of action and the scope

[25]Legislative history materials are relatively inaccessible to the public at large and that in itself raises questions about the fairness of resorting liberally to such materials as a principal aid to statutory construction or to correct what some might believe to be unintended omissions from a statute. This is particularly true of statutes enacted under the conditional spending power where obligations are undertaken consensually and the reliance interest of public and private institutions is great. Has the federal government ever in its regulations under Title IX (or any analogous statute) stated that recipients of federal financial assistance take the assistance with the understanding that they are subject to private damages actions for discrimination? Has the federal government ever provided such notice in grant contracts or official documents associated with the distribution of federal financial assistance? As far as Respondents can determine, the answer to both questions is no. Yet, twenty-seven years after the enactment of Title VI and nineteen years after the enactment of Title IX, this Court is asked to announce the unearthing of a long neglected but preexisting damages remedy that may well be retroactively applicable. *James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S.Ct. 2439 (1991).

of remedy because it knew that judge-made law would fill in the gaps.[26] For several reasons, the argument is unpersuasive.

If one examines the implied right of action cases decided by this Court up to 1964, they do not hold, much less suggest, a universalist view that all statutory rights recognized by implication are automatically enforceable to the same extent and by means of the same remedial mechanism that would apply in a common law tort action.[27] In fact, the configuration in these cases was private litigant versus private litigant, and the rights of action implied came in areas where Congress' power to regulate was well established. Moreover, in at least four cases, there was a parallel between the right implied and a counterpart right in the law of torts.[28] For these reasons, it is understandable that federal judges prior

[26]This argument is twice removed from the actual text of Title IX. When a court examines legislative history, it uses secondary evidence since it looks outside the text of the statute. When a court applies the presumption that Congress is knowledgeable about the law, it goes further afield from the text of the statute and makes two key assumptions, one of which cannot be refuted: (1) its own description of the law at a given point in time is accurate and refers to a body of law that was primarily relevant to the legislative debate; and (2) Congress' actual understanding of the law was the same as that which the court describes. At some point in this process, meaning is not something that inheres in the language of a statute.

[27]*Calhoun v. Harvey*, 379 U.S. 134 (1964); *J.I.Case v. Borak*, 377 U.S. 426 (1964); *Weldin v. Wheeler*, 373 U.S. 647 (1963); *Machinists v. Central Airlines*, 372 U.S. 682 (1963); *T.I.M.E., Inc. v. United States*, 359 U.S. 464 (1959); *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Bell v. Hood*, 327 U.S. 675 (1946); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Texas and Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916).

[28]*J.I. Case v. Borak*, 377 U.S. 426 (1964); *Bell v. Hood*, 327 U.S. 675 (1946); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *Texas and Pacific R. Co. v. Rigsby*, 241 U.S. 33 (1916).

to 1964 might have undertaken a strong role in the recognition of implied statutory rights and the fashioning of appropriate remedies to enforce those rights. It was a role that may have been familiar to them and one that state court judges exercising common law powers would not have found unusual.

The question is whether this is the relevant body of case law for purposes of gleaning congressional intent on *implied remedy* as of 1964 when Title VI was passed. Respondents think not. None of the pre-1964 implied right of action cases dealt with the very different and more difficult question of the enforcement of implied statutory right of action claims against government — national, state or local — or against a private person or entity whose conduct might fall outside of Congress' constitutionally established regulatory power. This point is important because, then as now, the absolute number of federal funding recipients that are public in nature must exceed, perhaps greatly, those which are private. If anyone in the 88th Congress actually thought about the implied right of action cases in deciding how to vote on Title VI (or Title IX in 1972), would not Eleventh Amendment sovereign immunity or the rule of municipal immunity in section 1983 cases have had a major bearing on the choice of remedial scheme?[29] Even cursory consideration of the well recognized law of government immunity in 1974 would have suggested the truly revolutionary nature of a Title VI damages remedy and would have provoked intense discussion of any such proposal if advanced seriously.[30]

[29]*See, e.g., Monroe v. Pape*, 365 U.S. 167 (1961); *Ex Parte Young*, 209 U.S. 123 (1908). So strong was the policy against imposing federal liability on state and local government that the antitrust liability of municipalities was not clearly established until *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), the same year *Monroe v. Pape* was overruled in *Monell*. Note that local government antitrust *immunity* was reestablished in 1984, 15 U.S.C. §§ 34-36 (1988).

[30]Not only would this have changed fundamental case law on immunity, it would have had immediate and potentially enormous financial implications.

C. Litigation of Title VI Cases 1964-1972

Judicial decisions between 1964 and 1972 do not bolster Petitioner's argument that the full panoply of common law damage remedies were a part of Title VI when originally enacted or the recognized law of the law land by 1972 when Title IX was passed. Respondents have found 56 lower court cases between 1964 and 1972 in which Title VI appears to have been a basis for the exercise of federal jurisdiction. These cases are listed in Appendix B. Virtually all of these cases involve an agency of local government as a defendant, most being school systems. In 14 of these cases, section 1983 provided a parallel basis for the exercise of federal jurisdiction. During this time period, section 1983, of course, permitted the award of both damages and equitable relief for constitutional violations, but, under this Court's ruling in *Monroe v. Pape*, 365 U.S. 167 (1961) did not authorize the recovery of damages against an entity of local government. In none of these cases did the plaintiff request under Title VI the type of damages that Petitioner now seeks as part of her Title IX claim. Equitable relief was, in fact, the only relief that any of the plaintiffs ever appears to have sought.[31] Recalling that these plaintiffs allegedly

Bear in mind that school desegregation litigation was at its height during this era. Many cases involved challenges to *de jure* segregation. If Petitioner's argument is accepted, it would mean the Congress of 1964 willingly accepted, or at least accepted the possibility of, a common law damages remedy on behalf of all school students who were the victims of such *de jure* segregation. *Bell v Hood* notwithstanding, Respondents doubt that anyone had that possibility in mind in 1964, much less desired to bring the outcome about legislatively.

[31]*Rolfe v. County Bd. of Educ.*, 282 F. Supp. 192 (E.D. Tenn. 1966), *aff'd*, 391 F.2d 77 (6th Cir. 1968) is cited by the Petitioner as presumably the leading case between 1964 and 1972 supporting the claim that "damages" has always been a part of the Title VI remedial scheme. If *Rolfe* was a part of the "clear, contemporaneous body of law, in an area of statutory interpretation that would obviously been of keen interest to Congress," Pet. Br. at 25, it appears to have been overlooked in the

were victims of intentional race discrimination, it is difficult to imagine a strategic rationale common to all of these cases that would explain the absence of damage demands for emotional injury (general) and for deterrence of wrongdoers (punitive).The most probable explanation for this pattern is the most obvious one: Congress, in fact, did not write Title VI or Title IX conferring a damages remedy on anyone.

D. Rationale for Preferring Equitable Relief Over Damages

Because of governmental and official immunities, equitable relief has always been more prominent than damages as a remedy in litigation in which a governmental agency or an official of such an agency is a defendant. For several reasons, the Court should reject Petitioner's contention that anything less than full common law damages under Title IX would constitute an injustice.

First, since Title IX, like Title VI, is based on the conditional spending power, Congress and particularly the federal oversight agencies have an obligation to make clear in advance

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legislative debate leading up to the enactment of Title IX in 1972. More important, the remedy awarded in *Rolfe* — despite the inapt use of the "damages" terminology — is clearly patterned after the remedial scheme established in Title VII which explicitly characterizes back pay as equitable in nature. *Rolfe* provides no support for the contention that Title VI, much less Title IX, includes a right to recover "compensatory, general and punitive" damages. To put this matter into a more contemporary perspective, the Court should recall its reasoning in *Consolidated Rail Corp. v. Darrone*, 465 U.S.624, 630 n. 9 (1984), a case that arose under section 504 of the Rehabilitation Act of 1973, another statute banning discrimination in a program receiving federal financial assistance. The distinction between monetary damages and back pay — or between legal and equitable remedies — was an important factor in the decision to uphold the Darrone claim.

the responsibilities that a recipient of federal funds assumes.[32] It is one thing to have a prohibition on sex discrimination and a statutory procedure for terminating funding. All recipients of federal funds have notice of that. It is something quite different, however, to permit juries to impose the full array of common law damage sanctions when that consequence is never discussed, much less agreed to, by the recipient. After twenty seven years of regulation under Title VI and nineteen years under Title IX without legislative or judicial imposition of a damages remedy, the reliance interest of recipient institutions, both public and private, ought to weigh heavily against Petitioner's argument.

Second, equitable relief is actually superior to the damages remedy in promoting all federal interests at stake in the Title IX context. Significantly, it permits a more sensitive and financially reasonable balancing of the recipient institution's educational goals with the individual's right to administer, teach or learn in an environment free of sexual harassment or other forms of sex discrimination. The aim of equitable relief under Title IX is primarily to eliminate the offending policy or practice and to deal with the persons behind it. But if purely prospective relief does not go far enough, equitable relief can even be employed to require a school system to make counseling

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[32]In *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), the Court held that when Congress imposed obligations under the conditional spending power, it must state the conditions under which the federal money and hence the legal obligation is assumed. The same reasoning ought to apply in the case of Title IX since the burden of defending damages actions and paying judgments is a financial burden of significance. *Id.* at 23-25. Describing the relationship between the federal government and the state as a "contract," the Court in *Pennhurst* observed: "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* 17. Respondents suggest that Title IX's silence on the damages remedy falls well short of the notice requirement established in *Pennhurst*.

or remedial instruction available to a student if needed to overcome any educational disadvantage resulting from the discrimination.[33]

Though Petitioner minimizes it,[34] the goal of restoring a student to an educational environment where he or she can make reasonable academic progress in the future is a worthy one. That goal of tailored relief was in fact achieved in the present case. The school system responded well before a lawsuit was filed. Every remedial step taken on Petitioner's behalf within the school system, including the establishment of a Title IX grievance procedure, and every remedial dollar spent went *directly* to protect and promote her right as a student to be free of sexual victimization. As far as the relative virtues and merits of equitable relief under Title IX are concerned, it is highly significant that remedial benefits to the aggrieved student can and frequently will benefit others in the educational environment as well.[35]

Finally, contrary to Petitioner's view, equitable relief has substantial deterrent effect. Any empirical assesment of this

[33]This could include tutoring if a student's grades dropped or her academic performance suffered due to being sexually victimized. If psychological problems resulted that might hamper a student's ability to make satisfactory academic progress in the future, the school system could provide necessary counseling and therapy, in many instances through the use of its own professional staff. As this Court has recognized, compliance with equitable remedies can require the expenditure of public funds sometimes in an amount that is quite significant. In *Missouri v. Jenkins*, 493 U.S. ____, 110 S.Ct. 1651 (1990), the Court held that a federal district court can require a local government to levy taxes to bring a school system into compliance with a school desegregation decree.

[34]Petitioner asserts that the choice is either "damages or nothing". Pet. Brief at 32.

[35]The grievance procedure worked to the benefit of all students. Also the resignations of Hill and perhaps Prescott rid the school system of two individuals who allegedly had victimized female students or were willing to tolerate such conduct.

claim inevitably has a speculative dimension. A more precise and perhaps more illuminating phrasing of this question might be: whether the deterrent effect of a Title IX damage award is appreciably superior to the regulatory benefits, including deterrence, of Title IX administrative oversight supplemented by equitable relief? As far as administrative oversight is concerned, there can be no doubt that the *general* threat of funding termination is *intended* to encourage good faith compliance with Title IX by all recipients of federal financial assistance. There also can be no doubt that a *specific* threat of funding termination (complete or partial) is likewise *intended* to correct conditions or to penalize conduct that violates Title IX. On the whole, there is a significant potential for deterrence inherent in the structured mechanism for enforcement of Title IX. Not to be overlooked in this vein is the fact that equitable relief under Title IX ultimately is backed by the trial judge's exercise of the contempt sanction.

It is difficult, therefore, to understand how the Petitioner can characterize this structured enforcement mechanism as *less effective* than a damages remedy in deterring Title IX violations. Or as *not effective* at all. Both schemes deter. The damages remedy, however, operates far more randomly and with less precision than equitable relief. Its ultimate appeal lies not in its quality as a deterrent but predominantly in its impact as a purely punitive measure. Damages, after all, does provide a type of personal vindication that equitable relief generally cannot match. However much the Petitioner might *prefer* the damages remedy with its presumed superiority as a deterrent to Title IX violations, the fact remains that its weaknesses much overshadow its benefits. In any event, as the very nature of this discussion reveals, the scope of the Title IX remedy is a matter that ought to be taken up by that Congress.

CONCLUSION

Respondents ask the Court to reject Petitioner's attempt to enlarge the remedies under Title IX to include damages in any form. The judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

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APPENDIX A

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Americans With Disabilities Act of 1990 42 U.S.C. § 12117	Express Mention	No Mention	No Mention	Yes	Yes	Yes
42 U.S.C. § 12133	Express Mention	No Mention	No Mention	Yes	Yes	Yes
42 U.S.C. § 12188	Express Mention	"Monetary Damages" (When Requested by Attorney General)	Express Ban	No Mention	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Civil Rights Act of 1964 Title II (Public Accommodations) 42 U.S.C. § 2000a *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Title VII (Equal Employment Opportunities 42 U.S.C. § 2000e *et seq.*	Express Mention "Backpay"	No Mention	No Mention	Yes	Yes	Yes

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Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Clean Air Act 42 U.S.C. § 7401 *et seq.*	Express Mention (May require bond)	No Mention	No Mention	Yes	Yes	Yes
Consumer Product Safety Act 15 U.S.C. § 2051 *et seq.*	Express Mention	Express Mention (knowing violation)	"Civil and Criminal Penalties"	Yes	Yes	Yes

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Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Education of Handicapped 20 U.S.C. § 1400 *et seq.*	No Mention	No Mention	No Mention	Yes	Yes	Yes
Emergency Planning & Community Right to Know 42 U.S.C. 11001 *et seq.*	Express Mention	No Mention	"Civil and Criminal Penalties"	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Energy Policy Conservation Act 42 U.S.C. § 6291 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Fair Credit Reporting Act 15 U.S.C. § 1681 *et seq.*	No Mention	Yes (for negligent & willful non-compliance)	Yes (for willful non-compliance)	Yes	No	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Fair Housing Act 42 U.S.C. § 3601 *et seq.*	Express Mention	Express Mention	Express Mention	Yes	No	Yes
Federal Tort Claims Act 28 U.S.C. § 2671 *et seq.*	No Mention	Express Mention	Ban on punitives (one exception)	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Federal Water Polution Control Act 33 U.S.C. § 1251 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Freedom of Information Act 5 U.S.C. § 552 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Hazardous Liquid Pipeline Safety Act 49 App. § 2001 *et seq.*	Express Mention	No Mention	Yes (In action brought by Attorney General	Yes	Yes	Yes
Marine Protection, Research, & Sanctuaries 33 U.S.C. § 1401 *et seq.*	Express Mention	No Mention	Civil and Criminal Penalties up to $50,000	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
National Historic Preservation Act 16 U.S.C. § 470 *et seq*	Yes (Implied by courts)	No Mention	No Mention	Yes	Yes	Yes (Implied by courts
Noise Control Act of 1972 42 U.S.C. § 4901 *et seq*	Express Mention	No Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Ocean Thermal Energy Conservation Act of 1980 42 U.S.C. § 9101 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Outer Continental Shelf Lands Act 43 U.S.C. § 1331 *et seq*	Express Mention (may require bond)	Express Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and/or Subdivisions	Private Cause of Action
Powerplant & Industrial Fuel Use Act of 1978 42 U.S.C. § 8301 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes
Privacy Act of 1974 5 U.S.C. § 552 *et seq.*	Express Mention	Yes (for willful & intentional violations	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and Subdivisions	Private Cause of Action
Racketeer Influenced and Corrupt Organizations (RICO) 18 U.S.C. § 1961 *et seq.*	Express Mention	Yes (treble damages)	No Mention	Yes	No	Yes
Safe Drinking Water Act 42 U.S.C. § 300f *et seq.*	Express Mention (may require bond)	No Mention	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and Subdivisions	Private Cause of Action
Surface Mining Control and Reclamation Act of 1977 30 U.S.C. § 1201 *et seq.*	No Mention	Yes ("May sue for damages")	No Mention	Yes	Yes	Yes

Act	Equitable Relief	Compensatory Damages	Punitive Damages	Court Costs and/or Attorney Fees	Right to Sue Gov't and Subdivisions	Private Cause of Action
Tax Equity & Fiscal Responsibility Act of 1982 26 U.S.C. § 7421 *et seq.*	Express Mention	Yes ("Civil Damages")	Yes (unauthorized disclosure of returns — willful violations	Yes	Yes	Yes
Toxic Substance Control Act 15 U.S.C. § 2601 *et seq.*	Express Mention	No Mention	No Mention	Yes	Yes	Yes

APPENDIX B

Lower Court Cases Between 1964 and 1972 Involving Title VI Claims; Chart Shows the Relief Sought by the Plaintiffs

NOTE: Asterik (*) Denotes Cases With a Parallel 42 U.S.C. § 1983 Claim. Subsequent Case History Does NOT Include Denials of Certiorari By United States Supreme Court.

Bradley v. School Bd. of City of Richmond, Va., 472 F.2d 318 (4th Cir. 1972) (Declaratory)

Johnson v. Combs, 471 F.2d 84 (5th Cir. 1972) (Injunctive; Attorneys' fees)

Duhart v. Carlson, 469 F.2d 471 (10th Cir. 1972) (Declaratory; Injunctive; Mandamus)

**Allen v. Mississippi Commission of Law Enforcement*, 424 F.2d 285 (5th Cir. 1970) (Declaratory; Injunctive)

Chambers v. Iredell County Bd. of Ed., 423 F.2d 613 (9th Cir., 1970) (Injunctive)

Henry v. Clarksdale Municipal Separate School Dist., 409 F.2d 682 (5th Cir. 1969) (Injunctive)

Taylor v. Cohen, 405 F.2d 277 (4th Cir. 1968) (Injunctive)

Board of Public Instruction of Duval County, Fla. v. Braxton, 402 F.2d 900 (5th Cir. 1968) (Injunctive)

**Smith v. Board of Com'rs. of District of Columbia*, 380 F.2d 632 (D.C. Cir. 1967) (Declaratory; Injunctive)

**Kelly v. Altheimer, Ark. Public School Dist.No. 22*, 378 F.2d 483 (8th Cir. 1967) (Injunctive)

**Cypress v. Newport News General and Nonsectarian Hospital Ass'n.*, 375 F.2d 648 (4th Cir. 1967) (Injunctive)

Smith v. Board of Ed. of Morrilton School Dist. No. 32, 365 F.2d 770 (8th Cir. 1966) (Injunctive; Back pay)

Davis v. Board of School Com'rs of Mobile County, 364 F.2d 896 (5th Cir. 1966) (Injunctive)

Singleton v. Jackson Municipal Separate School Dist. 355 F.2d 865 (5th Cir. 1966) (Injunctive)

Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965) (Injunctive; Attorneys' fees)

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(9)

No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
Petitioner,

v.

GWINNETT COUNTY SCHOOL DISTRICT and
DR. WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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---

REPLY BRIEF FOR PETITIONER

Most of the arguments presented by respondents and the United States are of little help in deciding this case because they address a question that is not at issue. Those arguments are aimed directly or indirectly at disputing that petitioner has any cause of action to sue for violations of Title IX. That question, however, was firmly settled by this Court in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). And *Cannon* both is, and should be, accepted in this case. Resp. Br. 7 (respondents "do not ask the Court to abandon *Cannon*"); Pet. Br. 8-10 (discussing reasons why *Cannon* cannot properly be overruled, including congressional "ratification" of decision, prior to the time this suit arose, in 42 U.S.C. § 2000d-7).

Because of *Cannon*, the issue in this case is not "the very existence of a private cause of action in the first

place," but the quite different question of "the nature of the relief that may be awarded to private parties" who concededly have a right of action (U.S. Br. 16)—more particularly, the relief available in a suit under a statute that is utterly silent on the scope of remedies for such a plaintiff.[1] That question, never squarely addressed by respondents and the government, has a well-established answer: the courts are to make available all appropriate, traditional remedies to give effect to such a right of action, unless Congress has somehow spoken to the contrary.[2] That rule not only was established at the time Title IX was enacted but remains in place today. The rule also is correct—necessarily so, because the only alternative would be for the judiciary to nullify the congressional grant of a right of action by refusing to award *any* relief for lack of congressional authorization.

In this case, Congress has not suggested that damages are inappropriate. On the contrary, Congress has indicated that such relief should be available to Title IX plaintiffs. And damages plainly would further rather than undermine Title IX's objectives. Petitioner is accordingly entitled to a damages remedy as relief in this congressionally authorized suit.

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[1] That the questions are distinct was expressly recognized by this Court in *Davis v. Passman*, 442 U.S. 228, 239 (1979): "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive."

[2] *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 595 (1983) (opinion of White, J., joined by Rehnquist, J.) ("The usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief."); Pet. Br. 11-14 (discussing cases and noting *Guardians* Court's agreement with presumption).

I. DAMAGES ARE PRESUMPTIVELY AVAILABLE AS RELIEF IN A SUIT, LIKE PETITIONER'S, THAT CONGRESS HAS AUTHORIZED WITHOUT ADDRESSING THE QUESTION OF RELIEF.

The bulk of respondents' brief and large parts of the government's brief argue against damages relief here by borrowing from the several precedents in which this Court, since 1975, has set forth its tightly constrained approach to recognizing implied rights to sue under federal statutes. These arguments are misplaced for at least three obvious reasons. First, the arguments are patently inconsistent with this Court's holding in *Cannon*, not disputed here, that petitioner has an implied right to sue under Title IX. Second, this Court has never extended its implied-right-of-action approach to the distinct question of relief under a statute that is silent on remedies for an authorized suitor. Third, the rationale of the implied-right-of-action cases does not carry over to the present question: indeed, the core of that rationale *supports* the still-recognized rule making traditional remedies presumptively available in suits that Congress has authorized without limiting or otherwise specifying relief.

1. Respondents' and the government's attempt to piggyback on the Court's implied-right-of-action doctrine is self-defeating in this case. Their arguments, if accepted, would make *any* remedy unavailable, including any form of equitable relief, in any suit brought under Title IX by a victim of sex discrimination. Those arguments would therefore overrule *Cannon* in everything but name. Because *Cannon*'s validity must be accepted, *Cannon* itself undermines the heart of respondents' and the government's case.

Even respondents acknowledge (Br. 7)—though the Solicitor General never does—that the broad arguments based on the Court's implied-right-of-action case law prove too much. Thus, if damages were unavailable simply because "the plain meaning of the text of Title IX

does not authorize a damages remedy" (Resp. Br. 4; *see also id.* at 10, 16), then no equitable relief or, indeed, any right of action would be available under Title IX, because it is equally true that the statutory language "says nothing about . . . a private right of action" or about equitable relief (Resp. Br. 10). Similarly, if damages relief were precluded here because Congress *typically* addresses itself to the remedies available in authorized suits (Resp. Br. 21 & App. 1a-14a), then the same fact would preclude any equitable relief and, indeed, the right of action itself, under Title IX. If the constitutional separation of powers barred damages relief simply because Congress has not authorized it (Resp. Br. 22-25; U.S. Br. 8-9, 26), the same argument would preclude equitable relief, which was no more addressed or authorized by Congress in Title IX. And if an award of damages were foreclosed by the fact that "the selection of statutory remedies involves inherently political choices" (U.S. Br. 9), preferably to be made by Congress, then equitable relief likewise must be foreclosed, and *Cannon*'s recognition of a right to sue repudiated. If, on the other hand, petitioner's right of action and the availability of equitable relief are taken as a given—as indeed they are by respondents and, apparently, by the United States—then none of these broad arguments can distinguish damages relief.

2. Respondents' and the government's arguments dwell on this Court's more restrictive approach, since 1975, with respect to implying a private right of action under a federal statute—an approach grounded in the institutional concern that the courts not tread improperly, perhaps unconstitutionally, on legislative turf. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-78 (1982); *Cannon*, 441 U.S. at 746-47 (Powell, J., dissenting). But the Court has not in fact carried that approach over to the different question presented here—not whether to infer a right to sue in the first place, but what relief is available when Congress

has granted a right to sue (implicitly or otherwise) but said nothing at all about relief. To the contrary, the established rule that all appropriate, traditional remedies are presumptively available in such circumstances remains good law.

The simple fact is that this Court has never repudiated that rule either by statement or by holding. Indeed, the Court clearly confirmed that the rule is still good law in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), where the rule was expressly relied on by some Justices (*id.* at 595 (opinion of White, J., joined by Rehnquist, J.)) and not questioned by any Justice (*see* Pet. Br. 13)—notwithstanding that this Court had been applying its more restrictive implied-right-of-action doctrine for several years. *See Merrill Lynch*, 456 U.S. at 377-78 (discussing strict approach).[3] Although the government tries to suggest otherwise in its brief (U.S. Br. 8-9, 11-14), no precedent undermines the rule recognized in *Guardians*.

Thus, not a single case cited by the government as supporting its position here involved a statute that grants a cause of action to particular individuals (implicitly or otherwise) while leaving the relief available to them wholly unaddressed. Nor did any of those cases discuss, much less repudiate, the principle relied on by petitioner here. Rather, every case involved either a rejection of a particular individual's right to bring a suit under a statute in the first place or consideration of what remedies were available under a statute in which Congress *had* addressed itself to the question of relief.[4]

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[3] *See also, e.g., Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981); *California v. Sierra Club*, 451 U.S. 287 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981); *Universities Research Ass'n v. Coutu*, 450 U.S. 754 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

[4] The following cited cases involved holdings that the plaintiffs had no right of action. *Virginia Bankshares, Inc. v. Sandberg*, 111

In particular, the government relies on *Cort v. Ash*, 422 U.S. 66 (1975), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), as its primary authority U.S. Br. 13-14. But neither of those cases involved a statute in which Congress had granted a private right to sue without addressing the question of relief. Most obviously, in *Cort v. Ash*—the case that initiated the Court's newly restrictive approach to inferring rights of action—the Court held that the plaintiffs had no private right of action under 18 U.S.C. § 610 prior to 1975, stressing that "there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone." 422 U.S. at 79-80; *id.* at 74. In addition, the Court in *Cort* also separately addressed the question of private suits for violations of 18 U.S.C. § 610 after January 1, 1975, observing that, after the case had been decided in the court of appeals, Congress enacted a new statute specifically providing for *prospective* enforcement of 18 U.S.C. § 610 by private persons. 422 U.S. at 74-77. Thus, contrary to the government's suggestion, the Court treated the plaintiffs' injunctive and damages claims separately, not because the private right of action question is the same as the question of the availability of various kinds of relief, but rather because the injunctive and damages claims addressed two different periods of time

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S. Ct. 2749 (1991); *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527 (1989); *Thompson v. Thompson*, 484 U.S. 174 (1988); *Texas Indus., Inc., supra*; *California v. Sierra Club, supra*; *Northwest Airlines, Inc., supra*; *Touche Ross & Co., supra*; *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *cf. Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986) (assuming no right of action). Of course, the Court found an implied right of action in *Merrill Lynch, supra*, where the plaintiffs were seeking *only* damages for past violations.

In *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985), the Court rejected a claim for certain kinds of damages under a statute (ERISA) that expressly specified the remedies available to the plaintiff.

during which two different statutes applied—one of which (post-Jan. 1, 1975) provided for private enforcement, while the other (pre-1975) did not.

Transamerica is likewise inapposite. There, the Court rejected an individual's claim for damages under § 206 of the Investment Advisers Act (15 U.S.C. § 80b-6) only after finding that § 215 of the Act (15 U.S.C. § 80b-15) gave the plaintiff "a right to specific and limited relief in a federal court" for certain violations of § 206 (or other provisions of the Act). 444 U.S. at 18, 23 (Act allows only "limited equitable relief" for plaintiff: *i.e.*, rescission and other relief to ensure that contract in violation of § 206 is "void" as declared by § 215). Thus, *Transamerica* simply confirms the basic rule of statutory construction, repeatedly applied by this Court, that "[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Massachusetts Mut. Life Ins. Co.*, 473 U.S. at 147 (quoting *Transamerica*, 444 U.S. at 19; and citing other cases to the same effect). But that rule does not apply to a case such as this, where a statute authorizes a private right of action while leaving the question of remedy entirely unaddressed. *See also* p. 12, *infra*.

3. There is an obvious reason why this Court's post-*Cort* approach to implied rights of action has never been extended to repudiate the established rule that, when Congress *has* granted an individual a right to sue but left remedies wholly unspecified, all traditional remedies are presumptively available. The rationale for the current implied-right-of-action doctrine simply does not carry over to justify abandonment of the rule governing the different issue presented in this case. To the contrary, the institutional concerns underlying that doctrine, far from undermining, actually support the presumptive availability of traditional remedies where Congress has not spoken on the relief awardable to a plaintiff authorized to sue.

The Court's implied-right-of-action doctrine rests fundamentally on a two-fold rationale—the sharply increased volume and complexity of federal legislation and litigation render it ever more impractical for the judiciary to make needlessly uncharted decisions about who may sue, and for Congress to respond to erroneous determinations; and the expanding complexity of federal legislation, with increasingly careful congressional attention to shaping variegated remedial schemes, makes it ever more implausible that Congress left the question of who may sue to be resolved by the judiciary. *See, e.g., Merrill Lynch*, 456 U.S. at 377; Resp. Br. 21 & App. A; U.S. Br. 9; Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 Wm. & Mary L. Rev. 827, 841-43 (1991).[5] Neither of those concerns, however, supports the view that Congress must authorize each particular form of relief before it may be awarded in a case like this. To

[5] Justice Powell, in his *Cannon* dissent, also noted a jurisdictional concern: when the lower federal courts, whose jurisdiction is limited to that which Congress gives them, recognize a right of action, they are creating a federal case. 441 U.S. at 746-47 (Powell, J., dissenting); *see* Mashaw, *supra* at 842-43. That concern has no application to the present question. Once it is accepted that Congress *has* given an individual the right to bring suit in federal court—as it is here—there can no longer be any concern about the federal courts extending their own jurisdiction to cover cases that Congress has not given them. Indeed, Justice Powell wrote the Court's unanimous opinion in *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), which held that back pay awards were appropriate under Title IX's sister statute, the Rehabilitation Act of 1974, 29 U.S.C. § 794, even though there was no clear congressional authorization for such a remedy.

Related to this jurisdictional issue is the concern that allowing private suits displaces state law by federal law in an area traditionally regulated by the states. *See Cort v. Ash*, 422 U.S. at 78; Mashaw, *supra*, at 843. But, again, this concern has no application where Congress has authorized private suits, making the determination that individuals should have enforceable federal rights in the particular area. Of course, *Cannon* rightly noted that Title IX's prohibition on discrimination by recipients of federal funds is squarely and historically a federal, not primarily a state, concern. 441 U.S. at 708.

the contrary, there are no serious practicality concerns here; and the necessarily dominant concern with respecting presumed congressional intent affirmatively supports the longstanding presumption in favor of traditional remedies for an authorized plaintiff when the question of relief has not been addressed by Congress.[6]

a. As to practicality, respondents and the United States suggest that applying the traditional rule would be grossly impractical because, if damages relief were recognized, the courts would have to answer many questions to give definition to the relief. Resp. Br. 14-15 & n.13; U.S. Br. 15. But this argument is inadequate for two obvious reasons. First, as a logical matter, the practicality concern cannot distinguish damages relief on an implied cause of action from other situations where relief would plainly be available. Second, the relief question presented here cannot raise substantial practical problems because the question arises infrequently (only when the statute grants a cause of action but is silent on relief); by con-

[6] Although the Court's approach to the present question, as to the implied-right-of-action doctrine, is necessarily informed by constitutional concerns about the proper role of the courts in our system, there plainly is no basis for the government's sweeping (and wholly unsupported) assertion that "[t]he courts lack constitutional power to recognize a statutory remedy that Congress has not authorized" (U.S. Br. 26)—even, presumably, where Congress has authorized a private right to sue but failed to address the question of relief. As a matter of both constitutional text and history, the separation of powers cannot be construed as prohibiting the courts from recognizing any remedies for a statutory violation unless Congress has affirmatively authorized them. Indeed, this Court (which has never even embraced Justice Powell's narrower, jurisdiction-based concern) has squarely repudiated such a position even as to the threshold question of implied rights to sue: the Court has noted, as Justice Frankfurter explained long ago, that the "judicial power" of Article III courts readily encompasses, and for almost 200 years was repeatedly held to encompass, the power to award appropriate relief as long as such relief was not precluded by Congress. *Merrill Lynch*, 456 U.S. at 375-77; *Montana-Dakota Utils. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 261-62 (1951) (Frankfurter, J., dissenting).

trast, the question whether to infer a right of action in the first place can arise with respect to virtually every statute enacted by Congress.

Thus, if damages relief were to be held unavailable here simply because recognizing such relief raises follow-up questions, then so too would injunctive relief and back pay. All of the so-called "collateral issues" identified by the government—such as "statutes of limitations, applicable standards of proof and causation, the availability of *respondeat superior* liability, the necessity for exhaustion of administrative remedies, [and] the relation between the implied remedy and express statutory remedies" (U.S. Br. 15; *see also* Resp. Br. 14-15 n.13)—must also be answered in a suit only seeking equitable relief. Equally important, the practicality argument would demand judicial nullification of statutes that, rather than leaving relief entirely unspecified, simply authorized "liability" in an "action at law" (*see, e.g.*, 42 U.S.C. § 1983) or simply authorized "such relief as the court determines is appropriate" (*see, e.g.*, 20 U.S.C. § 1415(e)(2), discussed at note 7, *infra*). Neither statute leaves fewer questions to be answered in judicial application. For example, every single follow-up question identified by respondents and the government—including the measure of compensatory damages and the availability of punitive damages—is raised by and must be answered under a statute, such as 42 U.S.C. § 1983, that provides for "liability" in an "action at law." Yet such statutes have never been treated as unenforceable, and could not properly be so treated, merely because Congress was silent with respect to issues that inevitably arise in application. There is no more warrant for denying damages relief on that ground here.

In any event, the question presented in this case is, by respondents' and the government's own account, a highly unusual one. The question arises only for those few statutes that provide a cause of action while leaving relief entirely unspecified. As respondents and the government

expressly confirm, such statutes are rare. And because this Court's great reluctance to recognize implied rights of action since 1975 has made such statutes a truly endangered species, the question is not likely to arise much in the future.[7]

b. What remains, then, is the preeminent concern with respecting congressional will. The strong reluctance to find implied rights of action reflects the now-realistic presumption that, when Congress explicitly provides for specified suits by specified parties, its omission of other suits

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[7] Respondents' statutory appendix, far from supporting their position in this case, illustrates how uncommon is the question presented here. All but one of the numerous federal statutes listed in the appendix specify the remedies available to the individuals who are authorized to sue. None of those statutes, therefore, raises the question of what relief is available when the statute is utterly silent on remedies.

The only statute listed by respondents that does not address the question of remedies is the National Historic Preservation Act, 16 U.S.C. § 470 *et seq.*, which carries an implied private right of action. But even there, limits on relief are suggested by the attorney's fees provision that implicitly (and clearly) authorizes the private right of action in the first place ("by any interested person to enforce the provisions" of the Act). 16 U.S.C. § 470w-4. We also note that one of the statutes that addresses remedies does so quite broadly: the Education for All Handicapped Children Act, 20 U.S.C. § 1400 *et seq.*, expressly authorizes a civil action in which the court may "grant such relief as the court determines is appropriate." *Id.* § 1415(e)(2). This Court, far from nullifying the statute for lack of sufficient guidance, has held that "retroactive reimbursement" is available under that provision. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370 (1985).

In short, if respondents' list is representative, the situation presented in this case—a statute authorizing an individual to sue but saying not a word about the available relief—is indeed rare. The United States agrees: "For decades at least, Congress has devoted great care to the remedies it has provided for statutory violations. Federal statutes provide for various combinations of private and governmental remedies . . . For many years, there has been no empirical justification for a presumption that Congress intends to provide a full array of remedies for any statutory violation." U.S. Br. 9.

reflects a deliberate choice that should ordinarily be respected. Similarly, when Congress expressly provides for particular forms of relief to particular authorized plaintiffs, it must naturally be presumed that Congress meant other forms of relief not to be available. But when Congress has authorized an individual to sue and said absolutely nothing about the available relief, the situation is dramatically different: there is then no longer any justification for presuming, on the basis of the actions that Congress actually took, that Congress must have wanted to restrict rights of action or remedies.

When Congress has authorized a plaintiff's suit but left relief issues entirely unaddressed, the natural presumption is and must be—as reflected in the traditional remedy rule—that Congress has left the determination of appropriate relief to the courts, applying their customary standards.[8] Since there is no evidence of a congressional selection among forms of relief, the only alternative to the traditional remedy rule would be to presume that the plaintiff is to be denied any relief whatever. But that approach, of course, would nullify the congressionally authorized cause of action. Thus, while judicial recognition of unexpressed rights of action or relief—in the face of explicit rights to sue or forms of relief—risks thwarting congressional will, in the present situation, it would be the *denial* of relief, where Congress has not evidenced a restrictive intent, that risks flouting congressional will. In short, if the courts refuse to exercise their expected authority to apply traditional remedies when Congress is silent, they effectively disallow any cause of action in the face of congressional intent that plaintiffs like petitioner be allowed to sue.

[8] That is especially so in cases involving statutes enacted at a time when the even broader authority to recognize rights of action in the first place was regularly, and with congressional awareness, being exercised by the courts. *See Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring).

Indeed, it would be especially anomalous to presume, in a merged system of law and equity, that Congress meant no relief to be available when it has authorized a suit but left remedies unspecified. When Congress allows an individual to file a "suit in equity," there is no further need for specificity before all appropriate forms of equitable relief are available. Similarly, when Congress allows an individual to file an "action at law," all traditional forms of legal relief are presumptively available, without need for further specificity from Congress. So, too, when Congress, without specifying "law" or "equity," simply grants an individual a right to bring a lawsuit in the federal courts—which have long operated as both law and equity courts—*any* form of traditional, appropriate relief must be presumed to have been congressionally authorized. The very breadth of the leeway left the courts cannot legitimately be turned upside down and transformed into a license to nullify the congressional grant of the cause of action.

II. DAMAGES RELIEF IS AVAILABLE UNDER TITLE IX.

To sustain rejection of damages relief, then, respondents and the government must show that such a remedy is somehow inconsistent with Title IX. This they cannot do. To the contrary, the best indication is that damages relief must be found to be available even if affirmative congressional authorization is required.

1. Most tellingly, Congress has by clear implication confirmed that damages are consistent with Title IX. Congress enacted the Civil Rights Remedies Equalization Amendment of 1986 to declare that "[a] State shall not be immune . . . from suit in Federal court for a violation of . . . title IX" or "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1).[9] That abrogation

[9] The next paragraph states that "[i]n a suit against a State . . . remedies (including remedies both at law and in equity) are avail-

of States' Eleventh Amendment immunity (*cf. Dellmuth v. Muth*, 491 U.S. 223, 229-30 (1989)), as a matter of both legislative history and necessary implication of the statutory text, embodies Congress's intent to allow private damages actions under Title IX.

First, as the legislative history expressly states, the provision was enacted for the express purpose of overturning this Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)—a case that, as Congress was aware, specifically involved a claim for "compensatory," "retroactive monetary relief" (*id.* at 236, 235). *See* S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986) (stating that the aim of the law was to reverse *Atascadero*'s rejection of suits against states "for retroactive monetary relief under Section 504 of the Rehabilitation Act" and other comparable statutes such as Title IX). Second, and perhaps more important, beyond its drafters' expressed intent, the 1986 Act's abrogation of Eleventh Amendment immunity makes no sense unless retroactive monetary relief is available under Title IX, Section 504, and related statutes. There is no point whatever to abrogating Eleventh Amendment immunity unless monetary relief is available under the statute, because injunctive relief against a state action can always be obtained by suing the responsible state officials, who, under *Ex Parte Young*, 209 U.S. 123 (1908), cannot claim any Eleventh Amendment immunity. The 1986 Act thus inescapably requires, in order not to be wholly meaningless, that monetary relief in private actions under Title IX be available.

2. None of respondents' and the government's arguments can overcome this clear indication of congressional

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able . . . to the same extent as such remedies are available . . . against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). These provisions took effect "with respect to violations that occur in whole or in part after October 21, 1986" (42 U.S.C. § 2000d-7(b)) and therefore were the law at the time that the present case arose.

policy or even, on their own terms, establish that damages are incompatible with Title IX. In the first place, respondent incorrectly suggests that it would have been "truly revolutionary" (Resp. Br. 29-30) for Congress to have authorized monetary relief against municipalities in 1972, the year Title IX was passed. By then, Congress had already enacted Title VIII of the Fair Housing Act of 1968, 42 U.S.C. § 3601 *et seq.*, providing a damages remedy (*id.* § 3612(c)), applicable to governmental as well as private parties. *See, e.g., Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972); *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). In addition, monetary damages had quite prominently been approved as a remedy available to plaintiffs exercising implied rights of actions under civil rights statutes, such as 42 U.S.C. § 1982. *See Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969). Further, just three months before Title IX (Pub. L. No. 92-318, § 901, 86 Stat. 373) was enacted, the very same Congress had specifically provided for monetary relief (in the form of back pay) against local governments under Title VII (Pub. L. No. 92-261, § 2, 86 Stat. 103). There is, thus, no basis for concluding that Congress could not have contemplated monetary damages under Title IX because the result would be municipal government liability.

That the legislative debates (either in 1964 or 1972) are silent on the question of damages relief (Resp. Br. 26-30) is neither significant nor surprising. *See Cannon*, 441 U.S. at 694. Congressional attention simply was not focused on the question of what relief would be available to the victims of discrimination who could sue. And although respondents (Br. 26-27) and the government (U.S. Br. 20) point to the proposed, but ultimately omitted, Keating amendment to the bill that became Title VI in 1964—an amendment that would have expressly authorized a right to sue for injunctive relief—the omission of that amendment no more precludes damages relief than

it precludes a right of action or, obviously, injunctive relief, which is concededly available here. *See Cannon*, 441 U.S. at 715 n.51 (omission of Keating amendment does not bar right of action). Indeed, the omission could as readily suggest congressional dissatisfaction with limiting relief to preventive injunctions as it might suggest that damages relief was beyond the pale. *See* U.S. Br. 21.

Nor does it help the government to observe (U.S. Br. 21) that Congress did not provide for damages in creating express causes of action in the 1964 Civil Rights Act. For one thing, that Act did provide for monetary awards (back pay under Title VII, 42 U.S.C. § 2000e-5(g)). Although that remedy was characterized as "equitable relief," it appears that Congress used the term to indicate (what was potentially of vital importance in 1964) a preference that discrimination claims be decided by judges rather than juries. *See, e.g., Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1239-40 & n.5 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970); *cf. Curtis v. Loether*, 415 U.S. 189, 191-92 (1974) ("supporters of Title VIII were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil rights damages actions") (footnote omitted). In any event, as noted above (*see* p. 12 *supra*), an express provision specifying remedies for particular plaintiffs reflects a congressional determination to limit relief for such plaintiffs; and it is precisely such a determination that is missing when Congress grants a right of action but leaves relief unaddressed. The government's argument, therefore, could succeed only upon a showing that there is somehow an *inconsistency* between damages relief for Title IX violations and the limitations on relief in the 1964 Act. That, however, is plainly impossible—and not ever directly suggested by the government. Indeed, it is no more possible to draw such a conclusion with respect to the 1964 Act than to conclude, for example, that the availability of damages under 42 U.S.C. §§ 1981 and 1982 is inconsistent with

the limits on relief in Title VII (employment) or Title II (public accommodation) of the 1964 Act. This Court has several times rejected just such arguments that overlapping and supplementary remedies were impermissible. *See* Pet. Br. 10 n.7 (citing cases).

3. Respondents further suggest that injunctive relief is preferable to damages, in that equitable relief deters violations (Resp. Br. 34) and often benefits other program participants (*id.* at 11, 33). As an argument against damages, that suggestion is patently inadequate for several reasons.[10]

Most obviously, it proceeds on the incorrect premise that this case requires the Court to choose between injunctive and damages relief. Of course, there is no reason why *both* types of relief should not be available. Thus, even if equitable relief could sometimes advance Title IX's goals more effectively than damages relief, that would be no ground for holding that *only* equitable relief is available. In addition, the grounds advanced for preferring equitable to damages relief are unpersuasive. Thus, equitable relief often does *not* benefit others, and may even *harm* others, as when court-ordered reinstatement of an employee requires the firing or demotion of the employee wrongfully hired in the plaintiff's stead. And the threat of damages relief, like an injunction, has a well-recognized deterrent effect that benefits all Title

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[10] Respondents briefly suggest, in deference to the court of appeals' central reliance on *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), that the recipients of federal funds are not on notice of the availability of damages relief. Resp. Br. 32-33 & n.32. But funds recipients are, of course, clearly on notice of their legal duty not to engage in discrimination—enforceable, even in respondents' view—and that is the only relevant notice under *Pennhurst*. Respondents seem to think that program recipients should be allowed to undertake a fine-tuned analysis of the ultimate costs of discriminating. Congress surely did not intend its prohibition on sex discrimination to be treated in that manner, as if the obligation could be discharged for a price.

IX beneficiaries. Indeed, as this Court has explicitly recognized, damages relief may often be an essential deterrent: unless faced with the prospect of damages, a defendant may feel free to engage in discrimination until ordered to stop. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975); *see Cannon*, 441 U.S. 705 (funding cutoff so extreme, and harmful to other students, that it is unlikely to be used to remedy individual discrimination).

The need for damages relief as an enforcement tool is, if anything, uniquely strong under a statute like Title IX, which prohibits discrimination against *students*, who are rapidly passing through their educational institutions. For such plaintiffs—for example, a high school student who is subject to discrimination in the middle of her senior year—any complaint seeking only prospective relief rapidly becomes moot. Many such plaintiffs, therefore, would have nothing to gain from a lawsuit, or so little that they would refrain from suing. Without damages, such plaintiffs would effectively be stripped of their Title IX rights, and educational institutions, of course, would be faced with that much less of a deterrent to discriminatory conduct. *Cf.* Resp. Br. 12 n.11 (citing *DeFunis v. Odegaard*, 416 U.S. 312 (1974), in which student's claim for injunctive relief became moot by progress through school, and noting that "[i]n contrast to requests for equitable relief, damages claims are never moot," citing *City of Los Angeles v. Lyons*, 461 U.S. 95 (1982)). In sum, damages are an appropriate and often necessary remedy for violations of Title IX that Congress authorized students like petitioner to bring to court.

CONCLUSION

The judgment of the court of appeals should be reversed, and petitioner's claim for damages reinstated.

Respectfully submitted,

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No. 90-918

In the Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN, PETITIONER

v.

GWINNETT COUNTY SCHOOL DISTRICT AND WILLIAM PRESCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Whether a private party may recover compensatory damages for an allegedly intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents the question whether the federal judiciary should imply a private right of action to recover compensatory legal damages for an allegedly intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* The United States has a substantial interest in the scope of any implied private remedies available under Title IX. Because the subject of any private action under Title IX is a program receiving federal funding, the United States has a strong interest in assuring that private remedies do not unduly interfere with such programs. The government also has an important interest in assuring that any implied remedies conferred by the courts on private parties are consistent with the enforcement program administered by the Department of Education pursuant to Section 902 of the Act, 20 U.S.C. 1682.

In response to an order inviting the Solicitor General to submit a brief expressing the views of the United States, we filed a brief suggesting that the Court grant further review.

STATEMENT

1. From 1986 to 1988, petitioner Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia. During that period, respondent Gwinnett County School District, which operates North Gwinnett High School, received federal financial assistance.

Petitioner's complaint alleges that a former teacher at North Gwinnett High School, Andrew Hill, subjected her to a series of sexual advances culminating in several instances of intercourse. According to the complaint, other teachers and school authorities became aware of Hill's sexual approaches to petitioner and other female students, but failed to respond. In February 1988, petitioner told the school's guidance counselor of Hill's actions, and the guidance counselor in turn advised the principal. The complaint alleges that after the principal initiated an investigation, respondent William Prescott urged petitioner to drop the matter. The school district closed the investigation when Hill resigned.[1]

On the basis of Hill's activity and other officials' failure to take action against him, Count I alleges that the school district intentionally violated Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Compl. ¶¶ 39-50. Count II alleges that Hill and Prescott "wilfully and intentionally violated [Title IX] by using their position of authority to force [petitioner] to drop the investigation" and that "[b]y failing to reprimand

[1] Compl. ¶¶ 8-14, 17, 19-27, 29-31, 33-35, 37. Because the courts below dismissed the action on the basis of the complaint, its allegations must be taken as true. *Conley* v. *Gibson*, 355 U.S. 41 (1957). We lodged copies of the original complaint and an amendment to the complaint (which attaches a report by the Department of Education on the results of its investigation) with the brief that we filed at the petition stage.

or otherwise discipline Dr. Prescott, [the school district] * * * condoned and ratified the conduct of Dr. Prescott and is responsible therefor." *Id.* ¶¶ 55-56. Both counts seek compensatory damages from the school district. *Id.* ¶¶ 51, 57.[2]

2. The district court granted respondents' motion to dismiss the action for failure to state a claim. Pet. App. 15-21. Noting "that the only real issue * * * is whether compensatory relief is available under Title IX," *id.* at 17, the court concluded that a Fifth Circuit decision, *Drayden* v. *Needville Independent School District*, 642 F.2d 129 (5th Cir. 1981), foreclosed that type of relief. Pet. App. 17, 18-19. The district court explained that *Drayden*'s holding—that the "private right of action allowed under Title VI [of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*] encompasses no more than an attempt to have any discriminatory activity ceased," 642 F.2d at 133—was also controlling with respect to Title IX.

3. The court of appeals affirmed. Pet. App. 1-14. The court noted that although it was "undisputed that an implied private right of action exists under Title IX," "the existence of a cause of action by no means assures a right to an unlimited array of remedies." Pet. App. 5-6. Like the district court, the court of appeals found that *Drayden* was "binding precedent" on the availability of damages under Title IX and that *Drayden* had not been overruled by *Guardians Ass'n* v. *Civil Service Commission*, 463 U.S. 582 (1983). Although *Guardians Ass'n*

[2] Petitioner has dropped her claim against respondent Prescott. Pet. Br. 2 n.1. The complaint also sought injunctive relief and punitive damages; those claims were abandoned in the district court and are not before this Court. See Pet. i; Pet. App. 17.

Before commencing this action, petitioner filed a complaint with the Office for Civil Rights ("OCR") of the United States Department of Education. After an investigation, OCR concluded that the school district had violated Title IX in several respects. Amended Compl., Ex. A, at 1, 7-8. Based upon the district's assurances that it would take action to correct the violations, however, OCR also determined that the district was "presently fulfilling its obligations with respect to Title IX" and closed the investigation. *Id.* at 1, 8.

"precludes a cause of action for compensatory damages for *unintentional* discrimination," the court of appeals explained, "the various opinions of a majority of the Justices simply leave[] *open* the question whether compensatory damages for intentional discrimination may be sought." Pet. App. 9.

On that question, the court found "important guidance" in Justice White's opinion in *Guardians Ass'n*, which suggested that only limited remedies should be implied for violations of statutes enacted pursuant to the Spending Clause. Pet. App. 9-10. Ruling that Title IX is Spending Clause legislation, the court stated that it would "proceed with extreme care when * * * asked to find a right to compensatory relief, where Congress has not expressly provided such a remedy as part of the statutory scheme, where the Supreme Court has not spoken clearly, and where binding precedent in this circuit is contrary." *Id.* at 11. The court of appeals concluded that "[b]ecause * * * the Supreme Court has not overruled *Drayden* either explicitly or implicitly," it was "bound to follow *Drayden*'s mandate that damages are unavailable under Title VI and IX." Pet. App. 12.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Constitution, "federal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95 (1981). Consequently, the power to create remedies for violations of federal statutes rests exclusively with Congress. In our view, Congress should be deemed to exercise that power only when it acts in the manner the Constitution prescribes, by passing a law that is presented to the President for approval. *INS* v. *Chadha*, 462 U.S. 919, 944-951 (1983). The role of the courts with respect to statutory remedies, in turn, should be the same as with respect to any other issue of statu-

[3] Judge Johnson concurred specially. He would have based the decision exclusively on *Drayden*. Pet. App. 13-14.

tory construction. Courts should restrict themselves to determining whether the language of the statute authorizes the remedy sought by a plaintiff, employing techniques of statutory interpretation to clarify any ambiguity in the text. "[I]mplying a private right of action on the basis of congressional silence is a hazardous exercise, at best." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979).

On occasion, however, this Court has recognized implied remedies in statutes that do not expressly provide them. In one such case, *Cannon* v. *University of Chicago*, 441 U.S. 677, 717 (1979), the Court held that a private plaintiff could maintain an action under Title IX "despite the absence of any express authorization for it in the statute." This case presents a question not decided in *Cannon* or in any of this Court's subsequent decisions—whether a private plaintiff may recover compensatory legal damages for a violation of Title IX.

I. The judiciary may not award damages under Title IX in the absence of an affirmative showing that Congress authorized that form of relief. Unless a congressional intention to provide a remedy "can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Karahalios* v. *National Fed'n of Federal Employees*, 489 U.S. 527, 532-533 (1989). That fundamental principle is applicable to each form of relief sought under a statute and to any extension of a previously recognized implied right of action.

The requirement of an affirmative showing of intent to confer a given remedy is grounded in limitations on the authority exercised by federal courts and in the realities of the modern legislative process. With respect to statutory remedies, "the federal lawmaking power is vested in the legislative, not the judicial, branch of government." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 95. Consequently, courts lack power to afford relief pursuant to a remedy that Congress has not author-

ized. Moreover, in view of the care with which Congress has fashioned statutory remedies in recent decades, there is no empirical basis for a free-floating presumption that the enactment of a statutory prohibition embodies a broad delegation to the courts to fashion whatever remedies they—as opposed to Congress—may consider appropriate. Any resort to such a presumption necessarily displaces political choices embedded in federal statutes.

II. None of the materials customarily employed in statutory interpretation—or in this Court's implied right of action cases—discloses an intention to allow private plaintiffs to recover damages for violations of Title IX. Title IX does not by its terms authorize the pursuit of *any* private remedies, and the form of its statutory prohibition is fully consistent with limiting awards to equitable relief. The legislative history reflects no expectation that damages would be available. There are indications that members of the 1972 Congress expected enforcement of Title IX to follow the form of Title VI of the Civil Rights Act of 1964, but private parties had not recovered damages under Title VI prior to 1972. Indeed, recognition of a damages remedy would contradict the legislative history of Title VI and other Titles of the Civil Rights Act of 1964.

Contrary to petitioner's contention, regulations promulgated pursuant to Title IX do not recognize a damages remedy in private actions. The regulation on which petitioner relies speaks only to the measures that may be imposed by the *agency*, not to relief recoverable in a private action, and the agency has not sought payment of compensatory damages in its enforcement of the statute. In any event, it is hardly unusual for enforcement schemes to confer greater remedial authority on governmental authorities than on private parties. None of the other grounds advanced by petitioner or her *amici*—the historical context of Title IX, subsequent enactments, or considerations regarding the relative wisdom of various possible remedies—justifies judicial implication of a damages remedy not set forth in the statute itself.

ARGUMENT

I. AN AFFIRMATIVE DEMONSTRATION OF CONGRESSIONAL INTENT IS REQUIRED FOR RECOGNITION OF AN IMPLIED DAMAGES REMEDY UNDER TITLE IX

In *Cannon*, an applicant for medical school who alleged that her applications had been rejected because of her sex brought an action under Title IX seeking declaratory, injunctive, and monetary relief.[4] Reversing the dismissal of the complaint, this Court held that the plaintiff was entitled to "maintain her lawsuit, despite the absence of any express authorization for it in the statute." 441 U.S. at 717. The Court did not consider, however, what forms of relief might be available in the newly-recognized action.

No subsequent decision of this Court has resolved the question whether a plaintiff may recover compensatory legal damages for a violation of Title IX or other similar statutes prohibiting discrimination in federally funded programs. In *Guardians Ass'n*, *supra*, a sharply divided Court upheld a judgment denying retrospective equitable relief for an unintentional violation of Title VI. In *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 630 (1984), the Court found that Section 504 of the Rehabilitation Act, 29 U.S.C. 794, "authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay," but reserved the question of "the extent to which money damages are available." 465 U.S. at 630. See also *Smith* v. *Robinson*, 468 U.S. 992, 1020 n.24 (1984).[5]

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[4] See *Cannon* v. *University of Chicago*, 406 F. Supp. 1257, 1258 (N.D. Ill. 1976).

[5] Contrary to petitioner's suggestion (Pet. Br. 28-29), there is a well-established distinction between money damages and equitable decrees requiring the payment of money. This Court has "long recognized the distinction between an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order provid-

A. As many recent decisions make clear, the question whether Title IX gives rise to an implied right of action to recover damages is "basically a matter of statutory construction." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979). Accord, *e.g.*, *Karahalios* v. *National Fed'n of Federal Employees*, 489 U.S. at 532-533; *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804, 812 n.9 (1986). An affirmative demonstration of Congress's intent to confer a statutory remedy is required. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California* v. *Sierra Club*, 451 U.S. 287, 297 (1981). "Unless such 'congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist.'" *Karahalios*, 489 U.S. at 532-533 (quoting *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988)).

The Court has applied that fundamental principle to each separate form of relief, see, *e.g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra*, and to any "extension or expansion" of a recognized right of action, *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. 2749, 2763 (1991). It is rooted both in the constitutional limits on the lawmaking authority of federal courts and in the realities of the modern legislative process.

1. "[F]ederal courts, unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 95. Except in certain areas, such as admiralty and maritime jurisdiction, the Constitution does not contemplate that federal

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ing for the reinstatement of an employee with back pay, or for 'the recovery of specific property *or monies*, ejectment from land, or injunction either directing or restraining the defendant officer's actions.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 893 (1988). There is no dispute that the relief petitioner seeks falls exclusively within the first category. All references to "damages" in this brief are to the compensatory legal damages described in *Bowen*.

courts will fashion substantive rules of decision, including those that determine the availability of remedies. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-646 (1981); *Northwest Airlines, Inc.*, 451 U.S. at 95-98. With respect to statutory remedies, "the federal lawmaking power is vested in the legislative, not the judicial, branch of government," and the courts are "subject to the paramount authority of Congress." *Id.* at 95. Therefore, the judiciary must identify "some congressional authorization to formulate substantive rules of decision," including those governing the availability of remedies. See *Texas Industries, Inc.*, 451 U.S. at 641.

2. Even apart from the issue of power, the realities of the modern legislative process support the principle that an affirmative showing of congressional intent is required for recognition of a statutory remedy. For decades at least, Congress has devoted great care to the remedies it has provided for statutory violations. Federal statutes provide for various combinations of private and governmental remedies; voluntary conciliation and administrative and judicial proceedings; and many forms of relief—including injunctions, other equitable relief, limited monetary damages (or double and treble damages), and attorneys fees. For many years, there has been no empirical justification for a presumption that Congress intends to provide a full array of remedies for any statutory violation. "The increased complexity of federal legislation and the increased volume of federal litigation" warrant "more careful scrutiny of legislative intent." See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-377 (1982).

Moreover, the selection of statutory remedies involves inherently political choices. Congress never provides for enforcement of a statute at any cost. Rather, it chooses remedies that will strike a balance between the goals the statute is designed to advance and other competing values. Such remedial choices are potentially as contentious as questions concerning the substantive provisions of a statute. Individual members of Congress regularly disagree over whether a given remedy is necessary for effective

enforcement (or, conversely, whether it will result in unduly burdensome enforcement). The remedies provided by a particular statute frequently reflect compromises encompassing both the substantive and remedial provisions of a statute. See *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) ("Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises."). It is not uncommon for proponents of broad remedies—including those who express their position in debates during the legislative process—to make concessions in order to facilitate legislation that might otherwise fail of passage.

In short, the question of what type of relief to afford for a violation of a substantive legal standard—injunctive, compensatory, penal; at the behest of the government or private parties—is no less a legislative policy judgment than the question of what the legal standard should be, and the policy judgments are closely interrelated. Congress might well decide that one standard is appropriate if enforcement is limited to government injunctive proceedings, while a different standard would be appropriate if private parties may sue for full compensatory damages. The question of what type of relief is available under a statute should therefore be subject to the same canons of construction as the question whether there exists a private cause of action at all. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. at 98 & n.41. Any resort to a presumption that a statute prohibiting certain conduct necessarily empowers courts to fashion whatever remedies they may deem appropriate necessarily involves the unelected judiciary in displacing political choices embodied in the statute.

B. Although petitioner appears to concede that an affirmative demonstration of congressional intent is required for recognition of a "private right of action," she argues that a diametrically different approach applies to the question of "remedies." Pet. Br. 6, 10, 14, 15. In her view, once it is established that a statute provides a "right of action," Congress is presumed to intend "all appropriate, traditional forms of judicial relief, unless it indicates otherwise." *Id.* at 11. This "in for a penny, in for a pound" approach is inconsistent with the proper role of the federal courts in our constitutional system and finds no support in this Court's more recent precedents.

1. In the context of statutory remedies, this Court has abandoned the analytical approach on which petitioner relies. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 374-378. As petitioner correctly notes, there were several cases in which this Court regarded an express grant of subject matter jurisdiction as a broad delegation of remedial discretion. The jurisdictional grant was said to provide "a general right to sue for [an invasion of federal rights]," and to empower the courts to "use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946).[6] However, in the statutory context, this Court has rejected the proposition "that * * * when the federal courts have jurisdiction to hear a case, they generally are *not* restricted in their ability to afford full relief" (Pet. Br. 15).

It is now clear that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law," including statutory remedies not authorized by Congress. *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. at 640-641. Indeed, in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 577, the Court specifically rejected a contention that an express grant of federal jurisdiction in the Securities Exchange Act of 1934 authorized the courts to award private remedies under the Act:

> Section 27 [of the 1934 Act, 15 U.S.C. 78aa] grants jurisdiction to the federal courts and provides for

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[6] See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239-240 (1969).

> venue and service of process. It creates no cause of action of its own force and effect; it imposes no liabilities. The source of plaintiffs' rights must be found, if at all, in the substantive provisions of the 1934 Act which they seek to enforce, not in the jurisdictional provision.

Nothing in *Guardians Ass'n* or *Darrone* breathed new life into petitioner's position. See Pet. Br. 13-14. In *Guardians Ass'n*, the holding of the Court conferred no relief on the plaintiffs; in *Darrone*, the Court reserved the question at issue here. 465 U.S. at 630.[7] Moreover, Title IX itself grants no subject matter jurisdiction over private actions, nor do its "substantive provisions" include "a general right to sue" for a violation of Section 901.[8] Whatever the merits of "implying" rights of

[7] In the context of constitutional violations, the Court has continued to regard the statutory grant of general federal question jurisdiction, 28 U.S.C. 1331, as a source of "authority to choose among available judicial remedies in order to vindicate constitutional rights." *Bush* v. *Lucas*, 462 U.S. 367, 374 (1983). See *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Davis* v. *Passman*, 442 U.S. 228, 245 (1979); *Carlson* v. *Green*, 446 U.S. 14, 18 (1980). However, in *Davis* v. *Passman*, *supra*, and *Touche Ross & Co.* v. *Redington*, *supra*, this Court effectively restricted this principle to constitutional actions. See 442 U.S. at 241 ("the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution"); 442 U.S. at 577 (limiting *J.I. Case Co.* v. *Borak*, *supra*, and holding that a statutory remedy "must be found, if at all, in the substantive provisions of" the statute giving rise to the remedy). It should come as no surprise that the scope of judicial authority is broader with respect to the Constitution than it is in construing statutes. For these reasons, contrary to petitioner's position (Pet. Br. 14), *Davis* v. *Passman*—which involved the implication of a cause of action under the Fifth Amendment—is inapplicable to this case.

[8] By contrast, 42 U.S.C. 1983 makes persons who violate certain rights under color of state law "liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress." In *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978), the Court determined that the damage awards expressly authorized by Section 1983 should be calculated to provide compensation for actual injuries. Nothing in *Carey* bears on the question here—which is what relief is available in the face of congressional silence. See Pet. Br. 12, 19.

action may be, there is no justification for treating silence as the equivalent of the broadest imaginable grant of remedial authority. Yet that is the gist of petitioner's position.

Consistent with the Court's focus on congressional intent, the relevant question is whether Congress has authorized the plaintiff to recover a particular form of relief. The nature of the pertinent inquiry is manifest in those cases in which the Court has been called upon to determine whether a plaintiff may recover more than one form of relief. In those cases, the Court has separately analyzed the question whether Congress intended to confer each remedy sought. The Court has not proceeded in the manner suggested by petitioner—*i.e.*, determining whether a "right of action" exists and then applying a presumption in favor of all forms of relief.

In *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals had held that a plaintiff could recover both damages and injunctive relief under a statute prohibiting corporate campaign contributions. This Court addressed each form of relief separately. It held, based upon recent amendments to the statute, that the plaintiff was limited to an express statutory procedure for injunctive relief. *Id.* at 77. The Court then employed its familiar four-factor analysis to determine whether damages were available. The Court held that "*such relief* is not available with regard to a 1972 violation under [the statute] itself," *id.* at 77-78 (emphasis added), reasoning that "implication of a federal right *of damages* on behalf of a corporation under [the statute] would intrude into an area traditionally committed to state law without aiding the main purpose of [the statute]," *id.* at 85 (emphasis added).

Similarly, in *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15-16, a case brought under the Investment Advisors Act of 1940, the Court stated that

"what must ultimately be determined is whether Congress intended to create the private remedy asserted." The Court held that the language of Section 215 of the Act "fairly implies a right to specific and limited relief in a federal court," 444 U.S. at 18—the right to bring an action for recission and restitution—noting that "the federal courts in general have viewed such language as implying *an equitable cause of action for rescission or similar relief*," *id.* at 19 (emphasis added). The Court did not simply conclude that there was a private cause of action, with all traditional remedies. And the Court went on to rule that "the Act confers no other private causes of action, legal or equitable," *id.* at 24, rejecting the claim that Section 206 of the Act affords a private cause of action for damages. The Court declined to adopt the dissent's suggestion—indistinguishable from petitioner's position—that "[o]nce it is recognized that a statute creates an implied right of action, courts have wide discretion in fashioning available relief." *Id.* at 30 (White, J., dissenting). Instead, the Court looked at the specific remedy being sought, and asked whether *Congress* authorized that particular form of relief. In other decisions, the Court has indicated that the pertinent issue is whether Congress intended to authorize a particular form of relief, rather than a "private right of action" in the abstract.[9]

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[9] *E.g., Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 413-414 (1975) ("The question presented by this case is whether such customers have an implied private right of action under the Securities Investor Protection Act of 1970 * * * to compel the SIPC to exercise its statutory authority for their benefit."); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at 374 (describing the question presented as "whether respondents may assert an implied cause of action for damages"); *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. 134, 136 (1985) ("The question presented for decision is whether, under the Employee Retirement Income Security Act of 1974 (ERISA), a fiduciary to an employee benefit plan may be held personally liable to a plan participant or beneficiary for extracontractual compensatory or punitive damages caused by improper or untimely processing of benefit claims.").

2. Remarkably, petitioner also suggests (Pet. Br. 15) that her presumption would reduce "the law's uncertainty" and actually deny courts "the kind of legislative authority that they are ill-suited to exercise." Precisely the reverse is true. Application of a presumption in favor of judicial implication of a full range of remedies would not serve to diminish *ad hoc* consideration of Congress's intent, since such a presumption would still require courts to examine whether Congress intended to withhold a particular form of relief.

To the extent that the presumption resulted in recognition of additional damages remedies, judicial exercise of legislative authority would increase. Courts would be called upon, in the case of each right of action, to resolve such collateral issues as statutes of limitations, applicable standards of proof and causation, the availability of *respondeat superior* liability, the necessity for exhaustion of administrative remedies, the relation between the implied remedy and express statutory remedies, and a host of other questions.[10] Undoubtedly, the availability of implied rights of action has given rise to uncertainty.[11]

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[10] See, *e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991) (statute of limitations); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. at 2763 (causation requirement); *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701 (1989) (*respondeat superior* liability vis-a-vis state actors and relation with express remedies); *Carlson* v. *Green*, 446 U.S. 14, 23-24 (1980) (survival of action upon plaintiff's death); *McCarthy* v. *Maddigan*, No. 90-6861 (presenting the question whether a prisoner must exhaust administrative remedies before commencing a *Bivens* action). When it enacts express remedies, Congress often supplies answers to those questions.

[11] See, *e.g., Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. 2773, 2780 (1991) ("In a case such as this, we are faced with the awkward task of discerning the limitations period that Congress intended courts to apply to a cause of action it really never knew existed."); *Virginia Bankshares, Inc.* v. *Sandberg*, 111 S. Ct. at 2763 (noting that causation requirement for an implied right of action is difficult to define, "for we can find no manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as respondents' theory of causation would entail").

But responding to that problem with petitioner's across-the-board presumption in favor of implied remedies would be using gasoline to extinguish a fire.

II. NONE OF THE MATERIALS ON WHICH AN IMPLIED RIGHT OF ACTION MAY BE BASED DISCLOSE A CONGRESSIONAL INTENTION TO AUTHORIZE AN AWARD OF DAMAGES FOR A VIOLATION OF TITLE IX

As noted, it is our position that the Congress and the courts occupy the same roles with respect to statutory remedies as they do with respect to any other "matter of statutory construction," *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 15. Because Congress exercises its power to make law only by enacting a statute that is presented to the President, the question whether it has enacted a remedy should be resolved by reference to the statute. *Thompson* v. *Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment). Techniques of statutory interpretation should be employed to clarify any ambiguity in the enactment, not to discern congressional intent apart from it.

We recognize, of course, that not all of this Court's decisions have conformed to that model. For instance, in *Cannon*, 441 U.S. at 717, the Court implied a cause of action "despite the absence of any express authorization for it in the statute." But in any event, none of the materials on which this Court has relied in implying statutory rights of action—including those invoked in *Cannon*—provides support for a damages remedy under Title IX. To the contrary, all indications are that Congress did not contemplate that damages would be available for violations of Title IX.

A. The Statutory Language

The language of Title IX is silent on the nature of the relief that may be awarded to private parties. This is hardly surprising, since the statute is silent on the very existence of a private cause of action in the first place. Mindful of the interpretive difficulties occasioned by

fleshing out a non-existent statutory provision, see *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S. Ct. at 2780, we believe that the statute is not framed in terms suggesting that awards of damages are essential for effective enforcement. On its face, Title IX prohibits three forms of discrimination in federally funded educational programs: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" any such program. 20 U.S.C. 1681(a). It is entirely consistent with this language to limit the implied remedies available to a private party to those necessary (1) to restore a plaintiff who has been wrongfully excluded from a federally assisted program to full participation, (2) to reverse any denial of benefits and to restore any benefits wrongfully withheld, and (3) to eliminate unlawful discrimination.

To be sure, in *Cannon*, 441 U.S. at 690-691, this Court placed great emphasis on the form of Title IX's prohibition on discrimination, emphasizing that it "expressly identifies the class Congress intended to benefit" and has "an unmistakable focus on the benefited class." This Court has since indicated, however, that language identifying a protected class is insufficient, in and of itself, to support a damages remedy. In *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. at 16-17, the Court noted that two provisions of the Investment Company Act, one of which prohibited frauds or deceits "upon any client or prospective client" of an investment adviser, "were intended to benefit the clients of investment advisers." Nevertheless, the Court continued, "whether Congress intended additionally that these provisions would be enforced through private litigation is a different question," *id.* at 18, and it declined to recognize an implied right of action for damages. See also *id.* at 24.

B. The Legislative History

Petitioner and her *amici* have failed to identify even a single reference in Title IX's legislative history to the possibility of an award of damages to a private plaintiff.

We are unaware of any legislative history supporting recognition of such a remedy. Indeed, all of the pertinent materials—including those on which the Court relied in *Cannon*—are consistent only with the conclusion that Congress did not contemplate awards of damages for violations of Title IX.

1. a. In *Cannon*, this Court found that "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years," 441 U.S. at 696, and reasoned, accordingly, that prior court decisions "reflect[ed] [Congress's] intent with respect to Title IX," *id.* at 697-698.[12] Significantly, in none of the cases to which the Court referred did the court sustain an award of damages for a violation of Title VI.[13] *Rolfe* v. *County Bd. of Ed.*, 282 F. Supp. 192

[12] This Court summarized the course of events that culminated in the enactment of Title IX in *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 523-530 (1982).

[13] See *Gautreaux* v. *Romney*, 448 F.2d 731, 740-741 (7th Cir. 1971), later appeal, *Gautreaux* v. *Chicago Housing Auth.*, 503 F.2d 930 (7th Cir. 1974), aff'd *sub nom. Hills* v. *Gautreaux*, 425 U.S. 284 (1976) (authorizing injunctive relief for housing discrimination); *Alvarado* v. *El Paso Indep. School Dist.*, 445 F.2d 1011 (5th Cir. 1971) (reversing dismissal of school desegregation suit without addressing appropriate relief); *Gautreaux* v. *Chicago Housing Auth.*, 436 F.2d 306 (7th Cir. 1970) (upholding injunctive relief), cert. denied, 402 U.S. 922 (1971); *Shannon* v. *HUD*, 436 F.2d 809, 822-823 (3d Cir. 1970) (authorizing declaratory and injunctive relief regarding location of a public housing project); *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir. 1967) (affirming denial of preliminary injunction against highway construction project), cert. denied, 390 U.S. 921 (1968); *Anderson* v. *San Francisco Unified School Dist.*, 357 F. Supp. 248, 255 (N.D. Cal. 1972) (awarding injunctive and declaratory relief to remedy "reverse discrimination" in employment); *Blackshear Residents Org.* v. *Housing Auth.*, 347 F. Supp. 1138, 1149-1150 (W.D. Tex. 1972) (awarding injunctive relief directed at segregated public housing); *Hawthorne* v. *Kenbridge Recreation Ass'n*, 341 F. Supp. 1382 (E.D. Va. 1972) (awarding injunctive relief directed at discrimination by private association receiving SBA loan); *Southern Christian Leadership Conference, Inc.* v. *Connolly*, 331 F. Supp. 940 (E.D. Mich. 1971) (denying motion to dismiss action for declaratory relief

(E.D. Tenn. 1966), aff'd, 391 F.2d 77 (6th Cir. 1968), which received only a "see also" citation in *Cannon*, 441 U.S. at 697 n.21, is no exception.[14] Thus, if the Congress that enacted Title IX was guided by the "state of the law at the time the legislation was enacted," *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. at

regarding discrimination in SBA loan program); *Hicks* v. *Weaver*, 302 F. Supp. 619 (E.D. La. 1969) (granting preliminary injunction); *Gautreaux* v. *Chicago Housing Auth.*, 296 F. Supp. 907, 914-915 (N.D. Ill. 1969) (granting injunctive relief directed at segregated housing); *Rolfe* v. *County Bd. of Ed.*, 282 F. Supp. 192 (E.D. Tenn. 1966) (dicta) (granting reinstatement and back pay for discrimination in employment in action brought under 42 U.S.C. 1983 and Title VI), aff'd, 391 F.2d 77 (6th Cir. 1968); *Gautreaux* v. *Chicago Housing Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967) (denying motion to dismiss action challenging allegedly segregated public housing); *McGhee* v. *Nashville Special School Dist. No. 1*, 11 Race Rel. L. Rep. 698 (W.D. Ark. 1966) (equitable remedies for segregated school system); *Lemon* v. *Bossier Parish School Bd.*, 240 F. Supp. 709 (W.D. La. 1965), aff'd, 370 F.2d 847, 852 (5th Cir.) (granting injunctive relief against segregated school system), cert. denied, 388 U.S. 911 (1967).

[14] Petitioner takes us to task for describing the monetary relief awarded in *Rolfe* as "back pay," rather than as "damages." Pet. Br. 25 & n.16. However, in the context of Title VII—the principal federal statutory prohibition on employment discrimination—back pay is a form of equitable relief, and does not constitute legal damages. See B. Schlei & P. Grossman, *Employment Discrimination Law* 1452 & n.153 (2d ed. 1983); C. Sullivan, M. Zimmer & R. Richards, *Employment Discrimination* § 15.1, at 53-54 (2d ed. 1988). It is for that reason that the right to a jury trial is inapplicable to Title VII actions. See *Great American Federal Savings & Loan Ass'n* v. *Novotny*, 442 U.S. 366, 375 (1979).

Moreover, while the court of appeals in *Rolfe* did use the term "damages," it did not mention Title VI, let alone describe it as the source of any monetary relief. Unlike the instant case, *Rolfe* was brought under 42 U.S.C. 1983 as well as Title VI, and the court of appeals referred only to Section 1983. The district court's passing reference to Title VI also did not identify that statute as the basis for monetary award. Even if it were reasonable to assume that Congress took its cue from *Rolfe* (and it is not), that case would not support petitioner's position.

378, it would not have expected the courts to award legal damages based upon violations of the statute.

b. The fact that judicial decisions may not have rejected awards of damages (see Pet. Br. 24)—since that issue was not presented—provides no support for a contrary conclusion. For there is evidence that Congress did not intend to provide damages under Title VI; the absence of any decisions suggesting otherwise would have been entirely consistent with that expectation.

During the course of Congress's consideration of legislation ultimately enacted as the Civil Rights Act of 1964, Senators Keating and Ribicoff proposed adding a provision giving private parties the right to enforce Title VI. Under that proposal, a "person aggrieved" by a violation of that statute would have been authorized to commence "a civil action or other proper proceeding *for preventive relief*, including an application for a permanent or temporary injunction, restraining order, or other order" (emphasis added).[15] Senator Keating explained that the purpose of his proposal was to allow suits to terminate funding or to require "specific performance of the nondiscrimination requirement" in Title VI.[16] The proposal was not adopted.

In *Cannon*, 441 U.S. at 716 n.51, this Court found that the omission of the Keating amendment from Title VI did not foreclose recognition of any private right of action under that statute or Title IX. The Court reasoned that the omission could have been part of a compromise, in which Section 601 was redrafted in a form "more conducive to implication of a private remedy against a discriminatory recipient * * *, but * * * arguably *less* conducive to implication of a private remedy against the Government (as well as the recipient) to compel

[15] 109 Cong. Rec. 15,375 (1963) (quoted in *Cannon*, 441 U.S. at 715 n.50).

[16] 109 Cong. Rec. 15,376 (1963) (remarks of Senator Keating). See Hearings Before the Senate Committee on the Judiciary on S. 1731 and S. 1750, 88th Cong., 1st Sess. 349-352 (1963). See generally *Cannon*, 441 U.S. at 713-716 & nn. 49-52.

the cutoff of funds." 441 U.S. at 716 n.51. Be that as it may, it is most unlikely that any member of Congress would have foreseen that such a compromise would lead to more expansive implied relief than even the most enthusiastic supporters of private remedies had advocated.[17]

None of the express private rights of action included in the 1964 Civil Rights Act provided for awards of damages. Title II authorized persons aggrieved by discrimination in public accommodations to commence "a civil action for preventive relief" and to recover attorneys fees. 42 U.S.C. 2000a-3. Title VII authorized injunctions against discrimination, reinstatement, and back pay, but not damages. 42 U.S.C. 2000e-5(g).[18] It is very doubtful that Congress could have intended to grant broader relief by implication in Title VI than it conferred expressly in any other provision of the 1964 Civil Rights Act. See *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 111 S.Ct. at 2780 ("We can imagine no clearer indication of how Congress would have balanced the policy considerations implicit in any limitations provision than the balance struck by the same Congress in limiting similar and related protections.").

c. The limitation on the monetary relief recoverable under Title VII is especially significant in view of the fact that the same Congress that enacted Title IX extended Title VII to educational institutions. See Pub. L. No. 92-261, § 3, 86 Stat. 103-104 (deleting the exemption for such institutions from the 1964 Act). In most cases,

[17] Ordinarily, of course, little significance can be attached to Congress's failure to enact a given provision. However, consistent with the unique approach to statutory interpretation that has been brought to bear on implied rights of action, this Court has relied on that type of inaction. *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 538-539 (1984). See, *e.g.*, *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458-461 (1974); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 21-22; *Massachusetts Mutual Life Ins. Co.* v. *Russell*, 473 U.S. at 146.

[18] Titles III and IV reserved private rights of action, but did not create them. 42 U.S.C. 2000b-2, 2000c-8.

persons alleging that they have been victimized by employment discrimination on the basis of race, color, or national origin in federally funded programs may not bring an action under Title VI. See 42 U.S.C. 2000d-3. Their remedies lie under Title VII, which is limited to equitable relief. Under petitioner's theory, however, plaintiffs suing under Title IX for employment discrimination on the basis of sex in federally funded programs would be entitled to legal damages. See *North Haven Board of Education* v. *Bell*, 456 U.S. 512 (1982). If petitioner is correct, then, the 1972 Congress would be deemed to have provided broader relief to employees of educational institutions who were victimized by sex discrimination than by race discrimination. That very implausible result should not be attributed to Congress. See *Shuttleworth* v. *Broward County*, 649 F. Supp. 35, 37 (S.D. Fla. 1986).

2. In *Cannon*, the Court also relied on Section 718 of the Education Amendments of 1972, 86 Stat. 369, as evidence that Congress intended to allow enforcement of Title IX by private parties. See 441 U.S. at 699-701 & nn. 25-28. Section 718, which has since been repealed, authorized an award of attorneys fees in an action under Title VI upon a finding that the action was necessary "to bring about compliance" with the statute. Consistent with the legislative history of Title VI and the actions that had been brought prior to 1972, that language is evocative of equitable relief, but not damages.

C. Administrative Enforcement of Title IX

Petitioner contends that a regulation promulgated by the former Department of Health, Education, and Welfare, 34 C.F.R. 106.3(a), and administrative practice in the enforcement of Title IX, support her claim to damages. Pet Br. 26-27. Neither the regulation nor administrative practice provide any support for a private damages remedy.

1. As its language makes clear, the regulation has nothing to do with the remedies available to private

parties in judicial proceedings. Rather, it directs recipients of federal financial assistance to take remedial action mandated by *the Department of Education* when *the Department* has found a violation (34 C.F.R. 106.3(a)):

> If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.

It is, of course, not unusual for enforcement schemes to distinguish between relief that might be sought by the government and that might be available at the behest of private parties. See, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987) (EPA may seek civil penalties for wholly past violations of Clean Water Act, while citizens suing under citizen-suit provisions may seek penalties only in conjunction with equitable relief).

The remedial orders referred to in the regulation are the end result of administrative proceedings. The regulations permit individuals to file administrative complaints alleging violations of Title IX.[19] (Petitioner filed an administrative complaint commencing such a proceeding before she brought this action. See Amended Compl., Ex. A.) The Office for Civil Rights of the Department of Education is then responsible for conducting an investigation. If OCR concludes that an institution receiving federal financial assistance has violated Title IX, it notifies the institution of the finding and attempts to resolve the matter by informal means—typically by specifying measures that it finds appropriate to bring the institution back into compliance with the statute. See 34 C.F.R.

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[19] 34 C.F.R. 100.7(b). See 34 C.F.R. 106.71 (making procedures promulgated under Title VI applicable to Title IX).

100.7(d).[20] If the matter is not resolved informally, the agency may commence proceedings to suspend or terminate federal financial assistance. 34 C.F.R. 100.8-100.9. Such a suspension or termination may be made contingent on specified terms and conditions, enabling the recipient to avoid a fund cutoff by taking steps to bring itself into compliance with Title IX. 34 C.F.R. 100.10(f).[21]

The remedial steps that the Department has directed in accordance with these procedures have included make-whole equitable relief, such as back pay and restoration of benefits wrongfully withheld. See *Romeo Community Schools* v. *HEW*, 600 F.2d 581, 583 (6th Cir.), cert. denied, 444 U.S. 972 (1979). We are advised, however, that the Department does not condition continuation of financial assistance on payment of legal damages. In any event, Title IX expressly empowers the Department of Education to secure compliance with the statute by terminating or suspending federal assistance or "by any other means authorized by law." 20 U.S.C. 1682. There is no evidence that Congress intended to authorize private litigants to obtain whatever relief is available to the agency charged with enforcing the statute.

2. In fact, recognition of an implied right of action for damages would be inconsistent with a prominent feature of the government's express remedy. The statute directs the government not to commence enforcement proceedings until it has "advised the appropriate person or persons of the failure to comply with [Title IX] and has determined that compliance cannot be secured by voluntary means." 20 U.S.C. 1682. The evident purpose of this scheme is to secure compliance without unduly divert-

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[20] In this case, for instance, OCR found that the school district had violated regulations promulgated under Title IX by failing to establish proper grievance procedures for complaints of sexual harassment. Amended Compl., Ex. A, at 7. That violation was resolved, however, by means of an assurance that the district had implemented proper procedures. See *id.* at 8, 9.

[21] A recipient is given the opportunity for a hearing and may seek judicial review. 34 C.F.R. 100.9, 100.11.

ing resources from educational programs to litigation. In our view, the Congress that made the government's express remedy for a violation of Title IX contingent upon the failure of efforts to obtain voluntary compliance with the statute should not be deemed to have saddled educational programs with the burden of litigating private actions seeking damages proximately caused by a past violation.[22]

D. Other Considerations

1. Lacking any evidence that any member of the 1972 Congress actually contemplated awards of damages under Title IX, petitioner argues that the "legal context" prevailing when the statute was enacted warrants attributing the requisite intention to the legislature. See Pet. Br. 21-26. She argues that Congress must have anticipated that the availability of private rights of action would be determined with regard to pre-1972 cases, under which the denial of any remedy was "the exception rather than the rule" (*id.* at 22).

There is no indication that when Title IX was enacted any member of Congress actually relied on this Court's pre-1972 case law regarding implied remedies. Since *Cannon*, moreover, this Court has repeatedly applied its prevailing approach—which requires some evidence of an actual intention to create an implied remedy—to statutes

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[22] See *Lieberman* v. *University of Chicago*, 660 F.2d 1185, 1188 (7th Cir. 1981) (awards of legal damages to selected beneficiaries of federal financing programs would threaten "a potentially massive financial liability"), cert. denied, 456 U.S. 937 (1982).

Petitioner and her *amici* make much of the fact that this case involves an allegation of "intentional" discrimination. However, that characterization rests on the assumption that Hill's state of mind (or the state of mind of those who failed to act on information regarding his misconduct) may be imputed to the school district. The availability of *respondeat superior* liability is a serious, unresolved issue. See *Jett* v. *Dallas Indep. School Dist.*, 491 U.S. 701 (1989).

enacted decades earlier than Title IX.[23] Indeed, if petitioner's approach to legal context were the law, it would have foreclosed the new approach that petitioner claims should not be given effect in this case. As the author of the opinion in *Cannon* observed in one of those cases, "I think it is more important to adhere to the analytical approach the Court has adopted than to base my vote on my own opinion about what Congress probably assumed in 1890." *California* v. *Sierra Club*, 451 U.S. at 301 (Stevens, J., concurring).

That course is well-founded. The courts lack constitutional power to recognize a statutory remedy that Congress has not authorized. They cannot properly circumvent that limitation by assuming that Congress must have expected the judiciary to recognize the remedy even in the absence of an affirmative demonstration of congressional intent. Moreover, in fashioning its current approach, the Court has responded to changes in Congress's practice regarding statutory remedies. See *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. at 374-377. There is no justification for applying a pre-

[23] See, *e.g.*, *Touche Ross & Co.* v. *Redington*, *supra* (Securities Exchange Act of 1934); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, *supra* (Investment Advisors Act of 1940); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754 (1981) (Davis Bacon Act of 1931); *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra* (Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963); *California* v. *Sierra Club*, 451 U.S. 287 (1981) (Rivers and Harbors Appropriation Act of 1899); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra* (Sherman Act of 1890 and Clayton Act of 1914); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) (Federal Water Pollution Control Act, a statute enacted in 1948 and substantially amended in 1972, and Marine Protection, Research, and Sanctuaries Act of 1972); *Daily Income Fund, Inc.* v. *Fox.*, 464 U.S. 523 (1984) (Investment Company Act of 1940). Significantly, in *Touche Ross & Co.* v. *Redington*, 442 U.S. at 577, this Court declined to extend the analysis of *J.I. Case Co.* v. *Borak*, *supra*, even though it had earlier been used to imply a remedy under the very statute at issue.

sumption here that is at odds with Congress's way of doing business.[24]

2. Petitioner (Pet. Br. 10) and her *amici* suggest that other statutes passed after Title IX support her claim to a damages remedy under Title IX. Those statutes do not shed any light on the question whether the 1972 Congress that enacted Title IX intended to authorize that form of relief. Each of those statutes, moreover, is entirely consistent with the view that damages are unavailable under Title IX. The Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. 2000d-7, withdraws Eleventh Amendment immunity from the States in actions under Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, and authorizes recovery from States of "remedies (including remedies both at law and in equity) * * * to the same extent as such remedies are available * * * against any public or private entity other than a State." The statute only provides for equal treatment of States and other defendants; it does not indicate what remedies are available from them. Cf. *Milwaukee* v. *Illinois*, 451 U.S. 304, 329 n.22 (1981) (savings clause preserving other remedies tells nothing about what other remedies may be available).[25] Likewise, the pertinent

[24] Even on its own terms, the inference that petitioner advocates is tenuous at best. Would it have been reasonable for any single member of Congress to have assumed, in 1972, that a statute would be construed in 1991 by reference only to decisions prior to 1972? Would any single member of Congress have been safe in assuming that his position on the meaning of those precedents and their continuing applicability would be shared by others? Would this Court be on firm ground in imputing meaning to silence on the basis of its answers to those questions? See *Thompson* v. *Thompson*, 484 U.S. at 192 (Scalia, J., concurring in the judgment) ("It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.").

[25] The statute was enacted in response to this Court's decision in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), which held that Section 504 of the Rehabilitation Act did not abrogate

provisions of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28-31, define the scope of the federally funded "programs" and "activities" in which discrimination is prohibited. See *Grove City College* v. *Bell*, 465 U.S. 555 (1984).

3. Finally, petitioner and her *amici* argue that damages have traditionally been favored over equitable relief, that any refusal to award damages would leave those in her position without compensation, that Congress could not have visualized a distinction between make-whole equitable relief (such as backpay) and damages, and that damages are best suited to accomplish the goals of Title IX. Pet. Br. 27-32. There is no evidence that Congress shared petitioner's assessment of those respective remedies.

To the contrary, in the one federal funding statute that does specify a private remedy for discrimination in federally funded programs, Congress provided only for injunctions. See 42 U.S.C. 6104(e). In Title VII, Congress limited victims of sex discrimination in employment, such as sexual harassment, to equitable relief, including backpay. The wisdom of that limitation is among the most contentious issues in the current debate over proposed civil rights legislation. Title VII is not exceptional in limiting private parties to specified forms of monetary relief. See *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. at 148 (although ERISA provides for recovery of withheld benefits, no recovery of "extracontractual damages caused by improper or untimely processing of benefit claims"); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. at 24 n.14 (construing Investment Advisors Act to provide for restitution, but not damages). A decision to grant equitable relief, but not consequential damages, cannot fairly be

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Eleventh Amendment immunity. That immunity is available against forms of relief other than damages. *Milliken* v. *Bradley*, 433 U.S. 267, 288-291 (1977); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

dismissed as unprincipled. *Burlington School Comm.* v. *Dept. of Ed.*, 471 U.S. 359, 370-371 (1985). It would not be arbitrary to conclude that judicial relief under Title IX should be focused on eliminating discrimination from federally funded programs, while avoiding damages awards that could reduce the resources available to all participants in the programs.

The point is that reasonable members of Congress could well differ on such questions. There is no evidence that the 1972 Congress resolved those questions in favor of a damages remedy under Title IX and, *sub silentio*, enacted that preference into law. Congress did not create an express private right of action for damages, nor is there any indication it intended the judiciary to imply one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
Petitioner,
v.
GWINNETT COUNTY PUBLIC SCHOOLS and
DR. WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF THE BLIND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, INC., NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL HEAD INJURY FOUNDATION, NATIONAL MULTIPLE SCLEROSIS SOCIETY, NATIONAL PARENT NETWORK ON DISABILITIES, PARALYZED VETERANS OF AMERICA, SPINA BIFIDA ASSOCIATION OF AMERICA, THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, AND UNITED CEREBRAL PALSY ASSOCIATION IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-918

CHRISTINE FRANKLIN,
Petitioner,

v.

GWINNETT COUNTY PUBLIC SCHOOLS and
DR. WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF THE BLIND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC., NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, INC., NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL HEAD INJURY FOUNDATION, NATIONAL MULTIPLE SCLEROSIS SOCIETY, NATIONAL PARENT NETWORK ON DISABILITIES, PARALYZED VETERANS OF AMERICA, SPINA BIFIDA ASSOCIATION OF AMERICA, THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, AND UNITED CEREBRAL PALSY ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*

Amici American Council of the Blind, *et al.* are twelve advocacy and service organizations nationwide that represent and serve the 43 million Americans with disabilities and their families. Each organization is actively involved in working to eliminate historical stereo-

types, prejudices and the resulting discriminatory practices and policies that serve to exclude Americans with disabilities from participating as valued and contributing members of our society.

Amici know through experience that the availability of monetary damages to redress violations of civil rights is essential to enforce the guarantee of equal citizenship that has been provided to Americans with disabilities by federal law. In the Brief for the United States as *Amicus Curiae*, the Solicitor General invites the Court to examine whether compensatory damages are recoverable in private actions brought under Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1988) ("Section 504"), in the context of this case, which concerns the availability of compensatory damages for intentional violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (1988). *Amici* recognize that any interpretation of Section 504 will, in significant part, determine whether the federal mandate of nondiscrimination based on disability will be realized. *Amici* therefore submit the following brief in support of petitioner. (Copies of letters from the parties consenting to the *Amici* filing this brief have been filed with the clerk of the Court.)

Amicus American Council of the Blind ("ACB") is the nation's largest nonprofit membership organization of people who are blind and visually impaired. ACB seeks to ensure that blind individuals have the opportunity to participate fully in all aspects of American life and to that end works to promote strong state and federal anti-discrimination laws.

Amicus Disability Rights Education and Defense Fund, Inc. ("DREDF") is a national disability civil rights organization dedicated to securing equal citizenship for Americans with disabilities. DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has

represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.

Amicus National Association of the Deaf ("NAD") is a national nonprofit organization whose members are deaf adults, parents of deaf children, and professionals in the area of service to individuals who are deaf. NAD is the largest consumer organization of people who are deaf in the United States.

Amicus National Association of Protection and Advocacy Systems, Inc. ("NAPAS") is the national association of 55 state and territorial-wide protection and advocacy systems of persons with developmental disabilities, which were established under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C.A. §§ 6001 *et seq.* (1988). NAPAS members are charged with pursuing legal, administrative, and other appropriate remedies to protect the rights of persons with mental retardation and developmental disabilities.

Amicus National Council on Independent Living ("NCIL") was established in 1982 as the national voice of independent living centers, which provide advocacy, information and referral services, independent living skills training and peer counseling to people with all disabilities, and which are governed and controlled by people with different types of disabilities. NCIL was organized in part to support independent living centers by conducting and coordinating the national advocacy efforts of the Independent Living Movement. Towards that end NCIL works to ensure that the civil rights of people with disabilities are strengthened and protected by law.

Amicus National Head Injury Foundation ("NHIF") is a nonprofit organization dedicated to preventing head

injuries and to improving the quality of life for people with head injuries and their families. NHIF was formed in 1980 and has since grown to an organization of over 10,000 members, 44 state associations and over 400 support groups across the country. NHIF is an educational and support resource for the over two million individuals who sustain a head injury each year, family members, professionals, service providers and concerned friends.

Amicus National Multiple Sclerosis Society ("NMSS") is a nonprofit organization which is comprised of 140 chapters and branches with 400,000 members nationwide. Since it was organized in 1946, NMSS has been dedicated to promoting the cure, treatment and prevention of multiple sclerosis (MS) and to improving the quality of life and enhancing independence for people with MS. NMSS advocates improvements in public policies that affect people with disabilities and their families. As part of its mandate, NMSS promotes laws to overcome discrimination and provide strong remedies for violations of the civil rights of people with disabilities.

Amicus National Parent Network on Disabilities ("NPND") is a national membership organization which represents over 500,000 parents and families who have a member with a disability. NPND's mission is to speak as a collective voice representing the perspectives, needs and interests of parents and family members of persons of all ages with a disability.

Amicus Paralyzed Veterans of America ("PVA") is a nonprofit organization chartered by the United States Congress and dedicated to serving the needs of its members—all of whom have catastrophic paralysis caused by spinal cord injury or disease. PVA has 33 chapters and 14 subchapters throughout the United States representing over 14,000 members. All of PVA's members are handicapped individuals within the definition of Section 504. PVA has been active in litigation and administra-

tive and legislative advocacy on behalf of people with disabilities and has worked to ensure the full implementation of rights guaranteed by Section 504. PVA operates a National Advocacy Program with the stated mission of promoting and defending the civil rights of all citizens with disabilities—veterans and non-veterans alike.

Amicus Spina Bifida Association of America ("SBAA") is a national nonprofit organization committed to guaranteeing the integration of people born with spina bifida into the mainstream of American society. SBAA works to promote national public awareness of and action on spina bifida, and to foster human rights and safeguard the well being of individuals with spina bifida. In furtherance of its goals, SBAA supports laws which strengthen civil rights protections for people with disabilities.

Amicus The Association for Retarded Citizens of the United States ("ARC") is the largest voluntary organization in the country devoted to securing the rights of, and effective services for, the approximately 7,200,000 Americans with mental retardation. The ARC has a national membership of more than 140,000 people, including persons with mental retardation and their parents, and has approximately 1,300 state and local chapters throughout the country. Members of Congress, state legislatures, rulemaking authorities, and the courts regard the ARC as a leading advocate for citizens with mental retardation. Recognizing that people with mental retardation are among the highly vulnerable class of people with disabilities who may be subject to discrimination, the ARC has been heavily involved in legislative efforts to end such discrimination.

Amicus United Cerebral Palsy Association ("UCPA") is a national nonprofit voluntary health organization formed in 1949. UCPA assists its 162 affiliates through-

out the country in the provision of rehabilitation and related direct services, such as education and advocacy programs, and other activities designed to promote the welfare of people with disabilities.

SUMMARY OF ARGUMENT

In section I, we demonstrate that, if this Court holds that Title IX remedies are limited, such holding may not be automatically extended to Section 504.[1] Consistent with this Court's decisions in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), and *Alexander* v. *Choate*, 469 U.S. 287 (1985), any examination of Section 504 remedies must include a full review of the legislative history of that provision. As this Court stated in *Consolidated Rail Corp.*, 465 U.S. at 633 n.13, "language as broad as that of § 504 cannot be read in isolation from its history and purposes." Neither interested parties nor the lower courts have had an opportunity to address the issue of Section 504 remedies. The writ of certiorari herein was granted on the limited question of the availability of compensatory damages in a private cause of action alleging intentional discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* and, therefore, this Court should not address the availability of compensatory damages under the Rehabilitation Act without the benefit of a complete record.

Should the Court examine the Rehabilitation Act, we establish in section II that the plain language and legislative history of the Rehabilitation Act at the time of

[1] *Amici* believe, as established by the petitioner, and *amici* National Women's Law Center, *et al.* with respect to Title IX, and Lawyers' Committee for Civil Rights Under Law with respect to Title VI, that Title VI and Title IX include the full measure of remedies to redress violations of those statutes. Title VI and Title IX, like Section 504, evidence a strong congressional prohibition against discrimination, which would be frustrated by limiting the availability of remedies.

enactment and later amendments, evidence Congress' intent to allow recovery of compensatory damages for violations of Section 504. In 1973, when Congress made it unlawful to discriminate on the basis of disability, it did so against a backdrop of established Supreme Court precedent that damages were available to redress violations of civil rights, absent an explicit contrary intention by Congress. Moreover, the amendments to the Rehabilitation Act in 1978 were specifically intended to " 'enhance the ability of handicapped individuals to assure compliance' " with Section 504 and to ensure administrative consistency by making "available" administrative remedies, rights and procedures provided under Title VI of the Civil Rights Act of 1964 through Section 505(a)(2), 29 U.S.C. § 794a(a)(2) (1988). Nothing in the legislative history of the 1978 amendments evidences any intent to limit available remedies. To the contrary, the 1978 amendments further demonstrate Congress' intent to strengthen the remedies available to enforce Section 504.

We also show in section II that in 1986, Congress passed the Civil Rights and Remedies Equalization Act of 1986 ("Remedies Act"), 42 U.S.C. § 2000d-7 (1988), in response to the Supreme Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), so as to provide damages in Section 504 enforcement actions against states in federal courts. In *Atascadero*, the Court barred individual plaintiffs from recovering these damages in federal courts from states that violate Section 504 because Congress had not clearly abrogated the states' eleventh amendment immunity, nor had the states waived such immunity. In direct response to this decision, Congress enacted the Remedies Act, which provided (i) that states were not immune under the eleventh amendment for violations of Section 504, and (ii) that remedies "both at law and in equity" were equally available against both state and non-state entities. Congress could not have intended this statute to allow only injunctive

remedies against states because state officials were already subject to such remedies.

Moreover, by responding directly to a Supreme Court decision, and leaving intact prior well-established interpretations of Section 504 allowing for compensatory damages against non-state entities, Congress extended such remedies to actions against states. Finally, when Section 505(a)(2) of the Rehabilitation Act was reenacted in Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. § 12133 (West Supp. 1991), Congress made explicit its intent that this section include a "full panoply of remedies." Consequently, the legislative history of the Rehabilitation Act, its amendments, the Remedies Act and the ADA conclusively establish that compensatory damages are available to enforce Section 504.

ARGUMENT

I. THIS COURT SHOULD NOT DETERMINE IN THIS CASE WHETHER A JUDICIAL REMEDY FOR COMPENSATORY DAMAGES IS AVAILABLE UNDER SECTION 504

This case involves a high school student who brought suit for compensatory damages pursuant to Title IX, alleging intentional discrimination based on gender. The United States District Court for the Northern District of Georgia dismissed petitioner's complaint on the basis that compensatory damages are unavailable under Title IX. On appeal, the Eleventh Circuit affirmed the dismissal, holding that damages were unavailable under Title IX in that circuit, pursuant to Title VI precedent of that circuit.[2]

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[2] Because decisions of the former Fifth Circuit rendered prior to October 1, 1981 are binding precedent on the Eleventh Circuit, *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981), the Eleventh Circuit relied on *Drayden* v. *Needville Independent School District*, 642 F.2d 129 (5th Cir. Unit A 1981), holding that damages were unavailable under Title VI. *Franklin* v. *Gwinnett County Public Schools*, 911 F.2d 617, 620 (11th Cir. 1990). As petitioner and *amici* demonstrate, compensatory damages are available under both Title VI and Title IX.

There has been no opportunity for interested parties to brief, or the courts below to consider, the issue of the availability of compensatory damages under Section 504. Hence, this issue is not properly before the Court. *See Tennessee* v. *Dunlap*, 426 U.S. 312, 316 n.3 (1976); *Blair* v. *Oesterlein Machine Co.*, 275 U.S. 220, 225 (1927).[3]

Moreover, to the extent that the Court limits the availability of damages under Title IX, this Court's previous decisions with respect to Section 504 caution against automatically extending such a limitation to the Rehabilitation Act. When faced with similar questions concerning the scope of Section 504 and its remedial provisions, this Court has resolved such issues in the context of a full examination of Section 504's legislative history. As the Court stated in *Consolidated Rail Corp.*, 465 U.S. at 633 n.12, "language as broad as that of § 504 cannot be read in isolation from its history and purposes." Thus, in addressing the question of whether Section 604 of Title VI,[4] 42 U.S.C. § 2000d-3 (1988), applied to Section 504, the Court held, based on the language and the legislative history of the 1978 amendments to the Rehabilitation Act, that Congress had not intended to impose any limitations on Section 504 when it incorporated Title VI "remedies, procedures and rights" into Section 505(a)(2) in 1978. *Id.* at 635.

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[3] This Court is also not called upon to address the issues of the availability of a Section 1983, 42 U.S.C. § 1983, cause of action to redress violations of Section 504, Title VI or Title IX. The Eleventh Circuit's opinion expressly stated, "We do not here reach the question of any legal rights which Franklin may or may not have under * * * any federal statute other than Titles VI or IX." *Franklin*, 911 F.2d at 622 n.10.

[4] Section 604 prohibits recipients of federal financial assistance from engaging in racial discrimination in their employment practices only where a "primary objective" of the assistance is to provide employment. 42 U.S.C. § 2000d-3 (1988).

In *Alexander* v. *Choate*, 469 U.S. 287 (1985), this Court also examined the legislative history of Section 504 in order to determine whether the statute covered disparate-impact discrimination. The Court did not extend to Section 504 its ruling in *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983), that Title VI itself did not prohibit disparate-impact discrimination [5] because "we assume without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Alexander*, 469 U.S. at 299. The Court emphasized that "too facile an assimilation of Title VI law to § 504 must be resisted." *Id.* at 293 n.7.

To the extent that this Court's ruling here limits the availability of remedies under Titles VI or IX, any extension of that ruling to Section 504 in this case would run counter not only to the Supreme Court's practice of considering Section 504 questions in the context of a fully developed examination of that section and its legislative history, but to *Consolidated Rail Corp.* and *Alexander*, wherein the Court refused to extend automatically limitations on Title VI remedies to Section 504. Moreover, the extension to Section 504 of any holding limiting the availability of compensatory damages would also result in this Court overruling, in the context of a case in which Section 504 has not been presented for decision, a large body of case law permitting recovery of such damages.[6] This Court should be wary to overrule this body

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[5] 463 U.S. at 610-11 (opinion of Powell, J., in which Burger, C.J. and Rehnquist, J., joined); *id.* at 612 (opinion of O'Connor, J.); *id.* at 635, 641-42 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined).

[6] *See Smith* v. *Robinson*, 468 U.S. 992, 1020 n.24 (1984) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504.") (citations omitted); *see also* note 22, *infra*. Moreover, one such case, *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982), was cited by Congress in the 1990 enactment of the ADA as an accurate judicial interpretation of congressional intent to provide a private remedy for money damages under Section 504. H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 52 & n.62, *reprinted in* 1990 U.S. Code Cong. & Admin. News 267, 475.

of case law absent full consideration of issues in a Section 504 case.

II. CONGRESS INTENDED COMPENSATORY DAMAGES TO BE AVAILABLE UNDER SECTION 504

A. Judicial Doctrine Applicable Both In 1973, When The Rehabilitation Act Was Enacted, And During Its Later Amendments Established The Availability Of Monetary Damages To Redress Violations Of Federal Civil Rights

As this Court stated in *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), the basic purpose of Section 504 "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." [7] In enacting Section 504 in 1973, and in the subsequent amendments to the Rehabilitation Act, Congress legislated with the understanding [8] that the full range of judicial remedies was available to redress invasions of federal rights. *See Bell*

[7] "Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment." 480 U.S. at 284.

[8] When determining whether a rule is implicit in a federal statutory scheme, "the initial focus must be on the state of the law at the time the legislation was enacted" and this Court "must examine Congress' perception of the law that it was shaping or reshaping." *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378 (1982). As this Court has said, "[i]t is always appropriate to assume that our elected representatives * * * know the law." *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-97 (1979); *see Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

v. *Hood*, 327 U.S. 678, 684 (1946); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969).[9] Congress' intent was thus that all remedies were available to enforce statutory rights unless specifically precluded by the legislation granting the rights. That this judicial presumption may have shifted, or have been subject to exceptions, in case law subsequent to 1978 has no relevance to an interpretation of what Congress intended in enacting or amending the Rehabilitation Act in 1973, 1974, and 1978, which must be analyzed in light of contemporaneous case law.[10]

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[9] This presumption was equally applicable to the enactments of Title VI in 1964 and Title IX in 1972 for Congress clearly intended that all judicial remedies be available to enforce federal rights under these statutes as well. As demonstrated by petitioner and *amici* National Women's Law Center, *et al.* and Lawyers' Committee for Civil Rights Under Law, compensatory damages are available for intentional violations of Titles VI and IX.

[10] There can also be no doubt that there is a private cause of action under Section 504. Both the language of the Rehabilitation Act and its legislative history make clear Congress' intent to have a private cause of action available to enforce Section 504. In the first set of amendments in 1974, Congress expressed its intent that enforcement of Section 504 "permit a judicial remedy through a private action." S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6391. Moreover, in 1978, Congress enacted a law allowing a prevailing party, other than the United States, to recover reasonable attorneys' fees in Section 504 cases. 29 U.S.C. § 794a(b). This provision was specifically designed to continue the availability of private causes of action under Section 504. Congress recognized that private enforcement of these Title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978); H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978).

In fact, the Solicitor General has previously admitted that to assert otherwise "is inconsistent with the language and history of the Rehabilitation Act." Brief for Solicitor General at 6-7, *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984) (LEXIS, Genfed library, Briefs file). According to the Solicitor General, espousing that there is no private cause of action "cannot be squared

The applicability of *Bell* v. *Hood's* presumption of a full range of judicial remedies to redress invasions of federal rights is discussed in detail in *Miener* v. *Missouri*,[11] where the Eighth Circuit found that Congress intended this presumption to apply to Section 504. Relying on the 1978 legislative history (discussed in detail below), the court explained that "[i]t is obvious that administrative remedies are inadequate to vindicate individual rights and that Congress could not have expected the individual plaintiff to be made whole through administrative procedures." *Miener*, 673 F.2d at 978. The court thus held "[w]e indulge the presumption of *Bell* v. *Hood*, * * * that a wrong must find a remedy, and in light of the inadequacy of administrative remedies, conclude that damages are awardable under § 504." *Id.*[12]

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with this Court's decision in *Cannon* * * * which held that a virtually identical provision in Title IX of the Education Amendments of 1972 * * * created a private right of action." *Id.* at 7.

[11] 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982). *Miener* was explicitly cited by Congress in 1990 when the remedial provisions of Section 504 (*i.e.*, Section 505(a)(2)) were reenacted in the ADA. *See infra* Section D.

[12] It was not until 1979 that the presumption in favor of broad remedial grants was even arguably reversed by *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979). In *Transamerica*, this Court stated that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 19. This pronouncement, however, was directly contrary to prior judicial statutory interpretation of which Congress can be presumed to have been aware when it enacted and twice amended the Rehabilitation Act. For a full analysis of the principles espoused in *Bell* v. *Hood* and *Sullivan*, *see* Briefs of *amici* National Women's Law Center, *et al.* and Lawyers' Committee for Civil Rights Under Law.

Moreover, the *Miener* court distinguished *Transamerica* in the context of Section 504, and held that even if *Transamerica* could be construed to shift the burden of proof to require a specific showing of congressional intent to create a damages remedy, "appellant can discharge that burden." *Miener*, 673 F.2d at 977-78 & n.8.

B. The Legislative History Of The 1978 Amendments Reveals Congress' Intent To Enhance The Ability Of Individuals With Disabilities To Ensure Compliance With Section 504 And Not To Limit Available Remedies

In 1978, Congress amended the Rehabilitation Act, adopting Section 505(a)(2), which provides:

> The remedies, procedures and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved * * * under section 504 of this Act.

Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (1978) (codified at 29 U.S.C. § 794a(a)(2) (1988)). As this Court recognized in *Consolidated Rail Corp.*, 465 U.S. at 635, the legislative history of the 1978 amendments makes clear that Section 505(a)(2) was "'designed to enhance the ability of handicapped individuals to assure compliance'" with Section 504 (quoting S. Rep. No. 890, 95th Cong., 2d Sess. 18 (1978)). Congress, therefore, clearly intended to expand the remedies available to enforce Section 504, rather than limit the relief available to victims of discrimination.

This interpretation of Section 505(a)(2) is consistent with the purpose of the 1978 amendments as a whole, as expressed by the legislators enacting them. The sponsors and proponents of the Senate bill repeatedly assured their colleagues that the purpose and effect of the legislation was to expand the opportunities for people with disabilities. Senator Randolph, the floor manager, opened the debate by asserting that "[a]ll of the provisions of this bill * * * not only provide opportunities to handicapped Americans to aspire to certain goals but also provide the means by which they can reach those goals." 124 Cong. Rec. 30,305 (1978). Senator Javits announced that the bill would "properly expand structures currently in place

to protect the rights of [citizens with disabilities]." *Id.* at 30,312.

This Court has already concluded that Congress' intent in incorporating Title VI "remedies, procedures and rights" into Section 505(a)(2) in 1978 was "to codify the regulations of the Department of Health, Education and Welfare governing enforcement of § 504." *Consolidated Rail Corp.*, 465 U.S. at 635 (citation omitted). For as the Senate Report states: "It is the committee's understanding that the regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under section 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement." S. Rep. No. 890, 95th Cong., 2d Sess. 19; *see Consolidated Rail Corp.*, 465 U.S. at 635 n.16.

The referenced Section 504 regulations [13] incorporate Title VI regulations [14] pertaining to administrative remedies, rights and procedures. This incorporation of Title VI administrative procedures furthered the congressional goal of administrative consistency expressed in 1974.[15]

Nothing in Section 505(a)(2)'s incorporation of Title VI administrative remedies or the regulatory codification was intended to alter Congress' intent to have a Section 504 "judicial remedy through a private action" which

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[13] *See* 45 C.F.R. part 84 (1990).

[14] *See* 45 C.F.R. §§ 80.6-80.10 and 45 C.F.R. part 41 (1990).

[15] The Senate Report to the 1978 amendments states: "The joint explanatory statement accompanying the conference report on H.R. 14226 (the Rehabilitation Act Amendments of 1974) * * * noted that application of the provisions relating to discrimination on the basis of race, creed, color, or national origin would assure administrative due process, and provide for administrative consistency within the Federal Government." S. Rep. No. 890, 95th Cong., 2d Sess. 19.

was, as noted above, expressly identified in the 1974 legislative history as *independent* of administrative remedies. S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6391. The referenced "judicial remedy" included the full measure of remedies available at that time. There is no evidence in the legislative history that Congress intended in any way to limit the availability of damages. To the contrary, as this Court recognized in *Consolidated Rail Corp.*, Congress intended to enhance the ability of individuals to vindicate violations of Section 504.[16]

The provision for counsel fees contained in Section 505(b) similarly evidences Congress' intent to facilitate rather than impede private enforcement of Section 504.[17] *See* 29 U.S.C. § 794a(b). The legislative history of the 1978 amendments further demonstrates that Congress knew how to incorporate limitations if it wished to do so. Section 104 of the 1978 amendments accorded to individuals with disabilities the right to an administrative hearing to review rehabilitative plans prepared for them by

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[16] For these reasons, the majority of circuit courts that have addressed the issue have held that compensatory damages are available to redress violations of Section 504. *See, e.g., Smith* v. *Barton*, 914 F.2d 1330 (9th Cir. 1990); *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir. 1982). In light of this legislative history, the Fourth Circuit's recent decision in *Eastman* v. *Virginia Polytechnic Institute & State University*, No. 90-1453 (July 12, 1991) (WESTLAW, Allfeds library), clearly misinterpreted congressional intent when it held that compensatory damages were barred as a result of the 1978 amendments.

[17] The 1978 Senate Report states that an attorneys' fee provision was necessary to assist " 'disabled people, who desperately need to vindicate their rights through the courts.' " S. Rep. No. 890, 95th Cong., 2d Sess. 19 (quoting testimony of Deborah Kaplan of the Disability Rights Center before the Subcommittee on the Handicapped). This is a clear indication of Congress' awareness of the necessary role of private litigation to vindicate rights under Section 504 and its intention to facilitate the ability of individuals to seek redress in the courts.

state agencies, and if the plans were upheld, to challenge them in federal court. 124 Cong. Rec. 30,292 (1978). Proposed subsection 104(f) expressly provided "No civil action may be brought under this section for monetary damages."[18] *Id.* at 30,293; *see also id.* at 30,315 (remarks of Sen. Javits). The failure of Congress to include similar language in Section 505(a)(2) evidences the absence of any intention to impose such a limitation on relief in Section 504 cases.

In light of legislative history expressing a clear intent to expand remedial protections, and the absence of any statutory language of limitation, there can be no credible suggestion that the incorporation provision of Section 505(a)(2), which expressly bolstered administrative enforcement mechanisms, simultaneously silently evidenced congressional intent to limit judicial remedies. "[I]t would be anomalous to conclude that the section, 'designed to enhance the ability of handicapped individuals to assure compliance with [Section 504]' * * * silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients * * *." *Consolidated Rail Corp.*, 465 U.S. at 635.

C. The 1986 Amendments Evidence Congress' Intent To Allow Compensatory Damages In Actions Enforcing Section 504

In 1986, Congress made clear its intent to allow compensatory damages under Section 504 when it passed the Remedies Act.[19] The Remedies Act responded to the

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[18] Ultimately, the conference committee replaced the civil action authorized by Section 104 with a right of review by the Secretary of HEW, and subsection (f) was thus eliminated as irrelevant. H.R. Conf. Rep. No. 1780, 95th Cong., 2d Sess. 68-69 (1978).

[19] This statute, in part, provides:

> In a suit against a State for a violation referred to in paragraph (1) remedies (including remedies both at law and in equity) are available for such a violation to the same extent

Court's finding in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), that the eleventh amendment barred the imposition of monetary damages against states in federal courts. The Remedies Act, therefore, allowed damage awards, including those available at law, to be awarded against states to the same extent that they were available against non-state entities. Given that injunctive relief was already available against state officials, Congress would not have passed a statute that merely provided relief already available. Because compensatory damages were allowed against non-state entities when this statute was enacted in 1986, the Remedies Act makes those damages available against states.

1. *To Limit Awards For Violations Of Section 504 To Injunctive Relief Would Make The Remedies Act Of 1986 Meaningless*

Congress intends its enactments to have meaningful effect, and this Court must, therefore, construe a statute to give it such an effect. *United States* v. *American Trucking Associations*, 310 U.S. 534, 542 (1940); *Sutton* v. *United States*, 819 F.2d 1289, 1295 & n.9 (5th Cir. 1987) (" 'basic principle of statutory construction . . . [is] that "a statute should not be construed in such a way as to render certain provisions superfluous or insignificant" ' ") (quoting *Woodfork* v. *Marine Cooks and Stewards Union*, 642 F.2d 966, 970-71 (5th Cir. 1981), quoting *Zeigler Coal Co.* v. *Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976)). In this case, not to allow awards of compensatory damages under the Remedies Act would make the statute superfluous and insignificant.

Congress created the Remedies Act in order to fill a gap left by this Court's decision in *Atascadero*. In that case, the Court held that retroactive monetary relief under Section 504 could not be awarded against states because Congress had not abrogated, nor had the states waived, the states' eleventh amendment immunity.[20] It is, however, well-established that state officials may be subjected to injunctive relief when they violate federal laws such as Section 504. *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 667-68 (1974); *Ex parte Young*, 209 U.S. 123 (1908). Thus, even after *Atascadero*, a private person could bring an action against state officials to force states to comply with federal law. To limit the Remedies Act to duplicating the type of relief already available against states would eviscerate the statute.

Congress responded to *Atascadero* because the Supreme Court had "misinterpreted congressional intent." S. Rep. No. 388, 99th Cong., 2d Sess. 27 (1986). Indeed, during the debate on the 1986 amendments, Congress made clear that it envisioned compensatory damages being available to enforce Section 504. As Senator Cranston, the author and sponsor of the Remedies Act, explained, even though injunctive relief was still available against states after *Atascadero*, such relief was inadequate:

> As the courts have acknowledged, Congress created a right of action in Federal or State court to remedy violations of section 504—with no exception in the law either from [sic] the States *or for any particular type of remedy, such as monetary damages.*
>
> Nevertheless, on June 28, 1985, in the case of Atascadero State Hospital versus Scanlon, the Supreme Court held * * * that the individual's claim for *compensatory damages* against the State or a State agency could not be heard in Federal court.
>
> The same holding also applies to injunctions, but it is well established that the 11th amendment does not bar Federal courts from issuing injunctions against named State officials, as distinguished from

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as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. § 2000d-7(a)(2) (1988).

[20] In *Atascadero*, "[r]espondent sought compensatory, injunctive, and declaratory relief." 473 U.S. at 236.

the State itself, even though the effect is exactly the same as an injunction against the State. Therefore, as the result of Atascadero, injunctive relief is now the only relief available in Federal court against a State agency for a violation of section 504 or any other civil rights statute on the receipt of Federal financial assistance.

* * * *

As a result of the Court's decision, a disabled individual who has suffered unfair discrimination at the hands of a State agency has two choices—a suit in State court for damages or injunctive relief, or both, or Federal suit for an injunction against individual State officials. Those choices are not adequate.

132 Cong. Rec. S15,104 (daily ed. Oct. 3, 1986) (remarks of Sen. Cranston) (emphasis added).[21] This Court has noted that comments by sponsors of language ultimately enacted "are an authoritative guide to the statute's construction." *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 526-27 (1982). Consequently, to hold

[21] As Senator Cranston recognized, injunctive relief alone is inadequate because:

> In a very real sense, the availability of only injunctive relief postpones the effective date of the antidiscrimination law * * * to the date on which the court issues an injunction because there is no remedy available for violations occurring before that date.

132 Cong. Rec. S15,105 (daily ed. Oct. 3, 1986). Many courts have confronted the inadequacy of injunctive relief as a remedy for past discrimination and have concluded compensatory damages were the only possible means of providing a remedy for educational, social or employment opportunities lost to individuals as a consequence of discrimination. *See, e.g., Poole* v. *South Plainfield Board of Education*, 490 F. Supp. 948, 949 (D.N.J. 1980) (plaintiff excluded from high school wrestling program awarded compensatory damages because of graduation from high school prior to court's decision); *Patton* v. *Dumpson*, 498 F. Supp. 933, 939 (S.D.N.Y. 1980) (compensatory damages awarded to plaintiff excluded from educational services by state agencies because of disability).

now that the law passed to overturn the effect of *Atascadero* is limited to injunctive relief, which already existed, would completely eviscerate the Remedies Act and render it nugatory.

2. *Congress' Purpose In Responding To* Atascadero *Was To Affirm Existing Case Law Providing For The Award Of Compensatory Damages Against Non-State Entities And To Extend This Law Against States*

The Remedies Act extended the relief already available against non-states to states. Thus, if the law in 1986 was that persons other than states were subject to monetary damages, then the Remedies Act subjected states to such damages. In fact, prior to the Remedies Act in 1986, the federal courts had routinely and consistently recognized the right to monetary damages, including compensatory damages, under Section 504.[22] Consequently,

[22] *See Smith* v. *Robinson*, 468 U.S. at 1020 n.24 ("courts generally agree that damages are available under Section 504"); *Moore* v. *Warwick Public School District No. 29*, 794 F.2d 322, 325 (8th Cir. 1986) (holding that individual plaintiffs have an implied cause of action for damages under Section 504); *Kling* v. *County of Los Angeles*, 769 F.2d 532, 534 (9th Cir.) (damages an appropriate remedy under Section 504, especially where injunctive relief has not remedied the harm), *rev'd on other grounds*, 474 U.S. 936 (1985); *Ciampa* v. *Massachusetts Rehabilitation Commission*, 718 F.2d 1, 5 (1st Cir. 1983) (assuming, but not deciding, that damages may be awarded under Section 504); *Monahan* v. *Nebraska*, 687 F.2d 1164, 1169 (8th Cir. 1982) (holding that a private action for damages is available), *cert. denied*, 460 U.S. 1012 (1983); *Miener* v. *Missouri*, 673 F.2d 969, 978 (8th Cir.) (legislative history of the Rehabilitation Act and inadequacy of its administrative remedies indicate that Congress intended to create a private right of action for damages), *cert. denied*, 459 U.S. 909 (1982); *Greater Los Angeles Council of Deafness, Inc.* v. *Zolin*, 607 F. Supp. 175, 181 n.10 (C.D. Cal. 1984) (recognizing the availability of monetary damages under Section 504), *aff'd*, 812 F.2d 1103 (9th Cir. 1987); *Fitzgerald* v. *Green Valley Area Education Agency*, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984) ("full panoply of remedies is available to a private plaintiff under § 504"); *Bachman* v. *American Society of Clinical Pathologists*, 577 F. Supp. 1257, 1262

because it was clear that compensatory damages were already available against non-state entities under Section 504, Congress did not need to specify these remedies when it responded to *Atascadero*.

(D.N.J. 1983) (plaintiffs may seek affirmative injunctive relief and monetary compensation under Section 504); *Wilder* v. *City of New York*, 568 F. Supp. 1132, 1135 (E.D.N.Y. 1983) ("inadequacy of injunctive and declaratory relief to compensate a particular plaintiff warrants the award of monetary damages"); *David H.* v. *Spring Branch Independent School District*, 569 F. Supp. 1324, 1340 (S.D. Tex. 1983) (Section 504 allows the recovery of monetary costs resulting from discrimination); *Nelson* v. *Thornburgh*, 567 F. Supp. 369, 383 (E.D. Pa. 1983) (Congress intended that the full panoply of remedies be available under Section 504), *aff'd mem.*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985); *Christopher N.* v. *McDaniel*, 569 F. Supp. 291, 296 (N.D. Ga. 1983) (damages available under Section 504 because of inadequacy of administrative enforcement remedies provided by the Rehabilitation Act); *Sanders by Sanders* v. *Marquette Public Schools*, 561 F. Supp. 1361, 1372 (W.D. Mich. 1983) ("remedies provided under the regulations promulgated to enforce the [Rehabilitation] Act will not provide relief to the aggrieved plaintiff"); *Hurry* v. *Jones*, 560 F. Supp. 500, 511 (D.R.I. 1983) (administrative remedies under Section 504 are inadequate to vindicate individual rights and plaintiff is entitled to compensatory damages for pain and suffering), *rev'd on other grounds*, 734 F.2d 879 (1st Cir. 1984); *Gelman* v. *Department of Education*, 544 F. Supp. 651, 654 (D. Colo. 1982) (compensatory damages available under Section 504); *Christopher T.* v. *San Francisco Unified School District*, 553 F. Supp. 1107, 1121 n.44 (N.D. Cal. 1982) (inadequacy of the Rehabilitation Act's remedial procedures strongly suggests that Congress intended that damages remedy be available to plaintiffs); *Philipp* v. *Carey*, 517 F. Supp. 513, 520 (N.D.N.Y. 1981) (Section 504 provides no exclusive remedies and an action may lie under 42 U.S.C. § 1983); *Hutchings* v. *Erie City and County Library Board of Directors*, 516 F. Supp. 1265, 1269 (W.D. Pa. 1981) (monetary damages available under Section 504 since nothing in statutory language or legislative history suggests Congress intended to limit suits to injunctive relief); *Poole* v. *South Plainfield Board of Education*, 490 F. Supp. 948, 949 (D.N.J. 1980) (monetary damages available because there are many plaintiffs for whom injunctive relief comes too late); *Patton* v. *Dumpson*, 498 F. Supp. 933, 939 (S.D.N.Y. 1980) ("Where * * * money damages are the

Indeed, this Court had previously acknowledged that "courts generally agree that damages are available under § 504 * * *." *Smith*, 468 U.S. at 1020 n.24. In light of the case law providing for compensatory damages prior to the Remedies Act in 1986, as well as the Supreme Court's expression of its view of the law, "it is abundantly clear that" the right to receive compensatory damages against non-state entities under Section 504 was a part of the "contemporary legal context" in which Congress legislated in 1986. *See Merrill Lynch*, 456 U.S. at 381. Consequently, Congress plainly intended for compensatory damages to be available under Section 504 when it extended those remedies then available against non-state entities to states. *See* note 22, *supra*.

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only means of compensating a victim of past discrimination, that remedy must be available to the plaintiff."); *cf. Carter* v. *Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984) (plaintiff must show intentional discrimination by the defendant to recover damages); *Scokin* v. *Texas*, 723 F.2d 432, 441 (5th Cir. 1984) (same); *Powell* v. *Defore*, 699 F.2d 1078, 1082 (11th Cir. 1983) (same); *Marvin H.* v. *Austin Independent School District*, 714 F.2d 1348, 1357 (5th Cir. 1983) (same); *Sabo* v. *O'Bannon*, 586 F. Supp. 1132, 1137 (E.D. Pa. 1984) (damages unavailable under Section 504 in the absence of allegation of intentional discrimination). *But see Byers* v. *Rockford Mass Transit District*, 635 F. Supp. 1387, 1391 (N.D. Ill. 1986) (Section 504 damages limited to equitable relief available under Title VII); *Bradford* v. *Iron County C-4 School District*, 37 Empl. Prac. Dec. (CCH) ¶ 35,404 (E.D. Mo. June 13, 1984) (compensatory damages for mental suffering unavailable under Section 504); *DuVall* v. *Postmaster General, United States Postal Service*, 585 F. Supp. 1374, 1377 (D.D.C. 1984) (Section 504 remedies limited to equitable relief), *aff'd mem.*, 774 F.2d 510 (D.C. Cir. 1985); *Longoria* v. *Harris*, 554 F. Supp. 102, 107 (S.D. Tex. 1982) (monetary damages unavailable under Section 504); *Gregg B.* v. *Board of Education of Lawrence School District*, 535 F. Supp. 1333, 1339-40 (E.D.N.Y. 1982) (monetary damages limited to back pay or tuition reimbursement allowed under Section 504); *Ruth Anne M.* v. *Alvin Independent School District*, 532 F. Supp. 460, 473 (S.D. Tex. 1982) (award of monetary damages not allowed under the Rehabilitation Act).

Moreover, Congress is presumed to be aware of judicial interpretations of a statute and, therefore, it adopts such interpretations when it reenacts a statute without a change. *Merrill Lynch*, 465 U.S. at 382 & n.66 ("comprehensive reexamination and significant amendment of the [Commodities Exchange Act which] left intact statutory provisions under which federal courts had implied cause of action is itself evidence that Congress affirmatively intended to preserve that remedy"). By extending those remedies previously available against non-state entities, Congress acted affirmatively to preserve those existing remedies, including in the case of Section 504, compensatory damages, when it passed the Remedies Act in 1986.

D. The Incorporation Of Section 505(a)(2) Remedies Into Title II Of The Americans With Disabilities Act Of 1990 Constitutes A Congressional Reenactment Of The Remedial Provisions Of Section 504 Mandating A Judicial Damages Remedy

Congress' intent that the incorporation of Title VI administrative remedies should not be construed as limiting availability of judicial remedies is further evidenced by legislative history accompanying the recent enactment of the Americans with Disabilities Act ("ADA"), 42 U.S.C.A. §§ 12101-12213 (West Supp. 1991). The incorporation of Section 505 remedies into Section 203 of the ADA constituted a reenactment of the remedial provisions of Section 504, and the 1990 legislative history both establishes and ratifies the intent of Congress in 1978 to provide a judicial damages remedy for enforcement of the nondiscrimination mandate of the Rehabilitation Act.

Section 203, pertaining to the enforcement of Title II of the ADA, provides:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202.

ADA, Pub. L. No. 101-336, § 203, 104 Stat. 328, 337 (1990) (codified at 42 U.S.C.A. § 12133). The legislative history of Section 203 specifically cites *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1982) (a leading case allowing an award of compensatory damages to enforce Section 504), and expressly and unequivocally states, "The Rehabilitation Act provides a private right of action, with a full panoply of remedies available, as well as attorney's fees." H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 52, *reprinted in* 1990 U.S. Code Cong. & Admin. News 267, 475.[23] Congress clearly endorsed and adopted the judicial interpretation provided by *Miener*, holding that a judicial remedy for damages was available under Section 504.[24]

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[23] H.R. Rep. No. 485 Part 3 recites this legislative history relative to "Section 205," the precursor section to that which was ultimately identically codified as Section 203 of the ADA.

[24] As discussed above, Section 505(a)(2) of the Rehabilitation Act states the remedies of Title VI "shall be available" to enforce Section 504. 29 U.S.C. § 794a(a)(2) (1988). By contrast, Section 203 of the ADA states that Section 505 remedies "shall be the remedies" of Title II of the ADA. 104 Stat. 337, 42 U.S.C.A. § 12133 (West Supp. 1991). In enacting the ADA, the House Judiciary Committee "adopted an amendment to delete the term 'shall be available' in order to clarify that the Rehabilitation Act remedies are the *only* remedies which Title II provides for violations of Title II." H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 52, *reprinted in* 1990 U.S. Code Cong. & Admin. News 267, 475 (emphasis added). This 1990 clarification, designed to establish congressional intent to limit Title II ADA remedies to those of Section 504 through specific incorporation of only those remedies, is further evidence that Congress did not intend, in 1978, to limit the Section 504 remedies to those of Title VI. The 1990 legislative history of the ADA makes clear that the "shall be available" language is not a limitation, because Congress found it necessary to utilize more precise language when it sought to limit remedies to those which had been previously adopted. Moreover, by enacting Title II of the ADA, Congress effectively reenacted Section 505(a)(2), as then interpreted, thereby establishing Congress' intent that a judicial remedy for damages be available to redress violations of Section 504.

CONCLUSION

For the foregoing reasons, this Court should not examine Section 504 in this action. If the Court does undertake such an examination, the Court should find that Section 504 violations may be remedied by awards of compensatory damages.

Respectfully submitted,

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No. 90-918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTINE FRANKLIN,
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v.
GWINNETT COUNTY SCHOOL DISTRICT and
WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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August 14, 1991

QUESTION PRESENTED

Whether a private party may recover compensatory damages for an intentional violation of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

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GWINNETT COUNTY SCHOOL DISTRICT and WILLIAM PRESCOTT,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted by the Lawyers' Committee for Civil Rights Under Law in support of petitioner Christine Franklin. By letters filed with the Clerk, petitioner and respondents have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

The Lawyers' Committee is a nonprofit organization established in 1963 at the request of the President of the United States to involve leading members of the bar in the effort to ensure civil rights for all Americans. As part of this effort, the Lawyers' Committee has participated as *amicus curiae* in two previous Title IX cases before this Court, *Cannon v. University of Chicago*, 441

U.S. 677 (1979) and *Grove City College v. Bell*, 465 U.S. 555 (1984). It also has represented parties or participated as *amicus curiae* in numerous cases arising under other federal antidiscrimination laws and under the Constitution.

This case raises an important issue concerning the relief available under Title IX, and the Court's decision may also affect the remedies available under Title VI of the Civil Rights Act of 1964—which served as the model for Title IX. Because the Lawyers' Committee frequently represents victims of race discrimination in litigation under Title VI, it has a particular interest in urging principles that will result in the sound application of Title VI, and in the resolution of any uncertainty as to whether the federal courts may provide full relief to victims of intentional race discrimination in federally assisted programs.

SUMMARY OF ARGUMENT

This case concerns a core judicial function—the award of remedies to implement a federal statutory cause of action. Petitioner has an unquestioned right under Title IX of the Education Amendments of 1972 to be free from sex-based discrimination in a federally assisted educational program. She has an equally unquestioned right to sue to redress an intentional violation of that right. The issue presented is whether the federal courts are disabled from providing compensatory damages as a means of such redress.

The federal courts have power to provide the relief requested. Nothing in the text of Title IX, its legislative history, or its animating purposes suggests that the courts have been denied that power. No circumstances exist here to displace the usual rule that all available remedies may be employed to vindicate federal rights. *Bell v. Hood*, 327 U.S. 678, 684 (1946). Indeed, that rule

applies with particular force where, as in this case, the choice is "damages or nothing."

Just as nothing in Title IX or its legislative history restricts the federal courts' familiar remedial powers, nothing in the Eleventh Amendment or principles derived from it requires that compensatory damages be withheld for intentional violations of Title IX. In *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981), this Court held that Congress must speak clearly when it seeks to create rights that are enforceable against the States. And in *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), two members of the Court found *Pennhurst* to support the denial of retroactive relief in an action against a public entity other than a State, where unintentional discrimination was alleged.

Pennhurst is satisfied here. Title IX speaks clearly and unambiguously; it creates enforceable rights, not a mere "nudge in the preferred direction." Having accepted an obligation not to discriminate, and having willfully violated that obligation, a recipient of federal funds should make good the injury done. Any doubt that Eleventh Amendment principles allow an award of damages against a public entity in these circumstances was explicitly removed by Congress when, in 1986, it reaffirmed the federal courts' authority to provide "remedies both at law and in equity" in Title IX actions against the States. 42 U.S.C. § 2000d-7 (1988).

ARGUMENT

Petitioner has alleged that she suffered intentional discrimination on the basis of sex at the hands of Respondents, in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1988). This case presents the question whether, if she proves her case, she may recover compensatory damages.[1] Congress did not expressly create a private cause of action when it enacted Title IX, and did not express a preference that certain forms of individual relief be available or unavailable. Congress did, however, establish an enforceable right for the benefit and protection of a defined class; and this Court has held that the statute therefore gives an implied cause of action to an injured member of that class. *Cannon v. University of Chicago*, 441 U.S. 677, 689, 717 (1979). This Court routinely has held that, where such a federal right has been invaded and a cause of action exists, "federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946).

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[1] References in the brief generally will be only to Title IX, the statute under which this case arises. This Court, however, has construed the remedial provisions of Title IX, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1988), and Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (1988) to be related. *See Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979); *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600 n.4 (1986); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 626, 630 & n.9 (1984); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529 (1982). Thus, whether compensatory damages are available under Title IX may bear strongly on whether such damages are available under Title VI and Section 504. In addition, cases construing either Title VI or Section 504 aid in the interpretation of Title IX.

I. UNDER THE LAW AS STATED IN *BELL v. HOOD*, COMPENSATORY DAMAGES ARE AVAILABLE TO A PRIVATE PLAINTIFF WHO PROVES AN INTENTIONAL VIOLATION OF TITLE IX.

Long ago, this Court held that, "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted); *see Davis v. Passman*, 442 U.S. 228, 245-47 (1979); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40 (1969). The rule of *Bell v. Hood* is grounded in the bedrock principle that, where federally protected rights have been invaded, a federal court may give an appropriate decree or award that will make the plaintiff whole. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (unless there are particular factors that "exclude the injured party from legal redress," the court will apply the " 'general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded.' ") (citation omitted).[2]

Bell v. Hood concerned the remedies available to a plaintiff who sued for violations of his Fourth and Fifth Amendment rights. 327 U.S. at 679. Thus, the rule taken from that case arose in the context of constitutional causes of action. However, prior to *Bell v. Hood*, the same rule had been applied in a statutory context.

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[2] *See also Hayes v. Michigan Cent. R.R.*, 111 U.S. 228, 239-40 (1884) (when a person is injured due to the breach of a statutory obligation, the person "is entitled to his individual compensation, and to an action for its recovery"); *Wicker v. Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867) ("The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed.").

See, e.g., Texas & Pac. Ry. v. Rigsby, 241 U.S. 33, 39 (1916).[3] Since *Bell v. Hood* was decided, it has been applied to constitutional causes of action, *see, e.g., Davis*, 442 U.S. at 245; *Bivens*, 403 U.S. at 396-97; and to statutory causes of action, *see, e.g., Sullivan*, 396 U.S. at 239-40; *Wyandotte Transp. Co. v. United States*, 389 U.S. 191, 200-204 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960). In fact, *Bell v. Hood* has been recognized as the "usual rule" for determining the relief to which an aggrieved party is entitled. *Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582, 595 (1983) (opinion of White, J.).

The Court has recognized only one exception to the *Bell v. Hood* rule: Remedies available to an aggrieved plaintiff may be restricted when Congress has made clear that particular remedies may not be awarded. *Guardians*, 463 U.S. at 595 (opinion of White, J.); *Davis*, 442 U.S. at 246-47 (plaintiff entitled to recover compensatory damages because there is no "explicit" congressional declaration that this remedy is not available); *Wyandotte Transp.*, 389 U.S. at 200-204; *see Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20 (1979) ("Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent."). As these cases stress, affirmative congressional intent to deny a particular remedy must be shown before the *Bell v. Hood* rule is displaced. *See Wyandotte Transp.*, 389 U.S. at 199-204.[4]

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[3] *See also Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 207 (1944); *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940); *Board of County Comm'rs v. United States*, 308 U.S. 343, 350 (1939); *Texas & New Orleans R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 569-70 (1930).

[4] *Cf. Cannon*, 441 U.S. at 694 (in context of determining whether implied private right of action exists, "'it is not necessary to show an intention to *create* a private cause of action, although an explicit

The *Bell v. Hood* rule applies to this case, and mandates that compensatory damages be available in Title IX cases involving intentional discrimination. *First*, Petitioner's complaint invokes federally protected rights. One of the primary objectives of Title IX was to "provide individual citizens effective protection against" sex discrimination. *Cannon*, 441 U.S. at 704; *see also id.* at 694 ("Title IX explicitly confers a benefit on persons discriminated against on the basis of sex"). *Second*, private suits may be brought for violations of these rights. *Id.* at 689, 717. The only question remaining in this case is whether compensatory damages are available to one who proves an intentional violation of Title IX.[5] *Bell v. Hood* answers that "federal courts may use any available remedy to make good the wrong done." 327 U.S. at 684; *see also Guardians*, 463 U.S. at 624-25 (Marshall, J., dissenting); *Sullivan*, 396 U.S. at 239-40; *Wyandotte Transp.*, 389 U.S. at 200-204; *see Davis*, 442 U.S. at 239 ("[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.").

Under *Bell v. Hood*, unless Respondents can show a clearly stated legislative intent to the contrary, a federal court may award any appropriate remedy that vindicates the federal rights being asserted. *See Bivens*, 403 U.S. at 396; *Transamerica Mortgage*, 444 U.S. at 30 (White, J., dissenting) ("in the absence of any contrary

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purpose to *deny* such a cause of action would be controlling'") (emphasis in original) (quoting *Cort v. Ash*, 422 U.S. 66, 82 (1975)); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 79 (1978) (White, J., dissenting).

[5] In *Guardians*, "a majority of the Court expressed the view that a private plaintiff under Title VI could recover backpay." *Darrone*, 465 U.S. at 630. A majority of the *Guardians* Court also "agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI." *Id.* at 630 n.9.

indication by Congress, courts may provide private litigants exercising implied rights of action whatever relief is consistent with the congressional purpose," and they "need not be restricted to equitable relief"). Because there is nothing in Title IX or in the legislative history surrounding its enactment that shows an explicit congressional intent to deny compensatory damages to victims of intentional discrimination in violation of Title IX, the rule of *Bell v. Hood* controls. *See Guardians*, 463 U.S. at 595 (opinion of White, J.); *Cannon*, 441 U.S. at 694; *Bivens*, 403 U.S. at 397; *Transamerica Mortgage*, 444 U.S. at 30 (White, J., dissenting).[6]

Especially strong indications of congressional intent to deny victims of intentional discrimination a damages remedy must be shown before the Court departs from the usual rule of *Bell v. Hood*. Compensatory damages are the normal remedy associated with violations of an individual's federally protected rights. *See Davis*, 442 U.S. at 245 (damages are normal remedy to redress violations of liberty interest); *see also Jett v. Dallas Indep. School Dist.*, 492 U.S. 701, 742 (1989) (Brennan, J., dissenting); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment). Injunctive or declaratory remedies often provide victims with little or no redress against those who have intentionally violated their rights. *See Transamerica Mortgage*, 444 U.S. at 35 (White, J., dissenting) (without damages remedy, victims "have little hope of obtaining redress for their injuries"); *Butz v. Economou*,

[6] The absence of legislative history showing that Congress wished to deny victims of intentional discrimination a damages remedy is not surprising, since the statute itself indicates no such intent. As this Court noted when considering whether Title IX created a private right of action, "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous" on that same subject. *Cannon*, 441 U.S. at 694; *see also Transamerica Mortgage*, 444 U.S. at 18.

438 U.S. 478, 504 (1978) ("Injunctive or declaratory relief is useless to a person who has already been injured."). Respondents can show no clearly expressed congressional intent to deny victims of intentional discrimination their normal and most effective remedy—compensatory damages.

As the normal remedy for intentional discrimination, compensatory damages unquestionably promote the objectives of Title IX. The Court should reject the United States' argument to the contrary. *Cf.* Brief for the United States as Amicus Curiae in Support of the Petition for Writ of Certiorari at 18-19. The prohibitions of discrimination contained in Titles IX and VI focus directly on eliminating discrimination in programs that receive federal funds. *Cannon*, 441 U.S. at 704; *see also* 110 Cong. Rec. 7062 (1964) (Title VI; comments of Sen. Pastore); *id.* at 1540 (Title VI; comments of Rep. Lindsay); 117 Cong. Rec. 39,252 (1971) (Title IX; comments of Rep. Mink); 118 Cong. Rec. 5806-07 (1972) (Title IX; comments of Sen. Bayh). By arguing that the overriding purpose of Title IX was to fund educational institutions, the United States confuses the purpose of Title IX with the purposes of the appropriations acts that fund particular federal programs. Those are obviously two different questions. The purpose of Title IX was to eliminate the use of federal funds to support discriminatory practices and to provide citizens with effective protection against those practices. *Cannon*, 441 U.S. at 704. A compensatory damages remedy only *furthers* this purpose by deterring intentional violators from accepting federal funds and by making victims whole if intentional violations occur. *See Carlson v. Green*, 446 U.S. 14, 21 (1980) ("[i]t is almost axiomatic that the threat of damages has a deterrent effect").

The United States invites the Court to depart from its established jurisprudence by posing what is, in light of that jurisprudence, the wrong question. The United States

asks whether "Congress intended to provide private litigants with a right to recover damages under Title IX." Brief for the United States in Support of the Petition for Certiorari at 15. But that is not the issue under the Court's precedents. The *correct* question, as noted above, is whether Congress explicitly stated an intent to *deny* victims of intentional discrimination a damages remedy. *See Guardians*, 463 U.S. at 595 (opinion of White, J.); *Davis*, 442 U.S. at 246-47. It is in this respect that congressional intent is relevant under the rule of *Bell v. Hood*. Congress stated no such explicit intent, as we have shown.[7]

The United States incorrectly states the question before the Court because it misconstrues this Court's cases. *First*, in support of its argument that Congress must have shown an intent to create a damages remedy before damages may be awarded, it relies solely on cases and language of this Court concerning whether Congress intended to create a *cause of action*. *See* Brief for the United States in Support of the Petition for Certiorari at 14 & n.22.[8] Under the cases discussed above, affirmative congressional intent may be the touchstone in *creating* a cause of action, but it is relevant only in

[7] The United States' formulation of the issue would require Congress to be more specific in affording remedies under implied causes of action than under expressly created causes of action. *See Wyandotte Transp.*, 389 U.S. at 200-04; *see also Cort*, 422 U.S. at 82-83 & n.14. Indeed, the inquiry advanced by the United States could result in very little relief being available under the Title IX implied cause of action or other implied causes of action, since it is "hardly surprising" for there to be little explicit congressional intent regarding remedies when Congress did not explicitly create a cause of action. *See* Brief for the United States in Support of the Petition for Certiorari at 15.

[8] Of course, this Court already has ruled that Congress intended a private right of action to exist under Title IX. *Cannon*, 441 U.S. at 694 ("the history of Title IX rather plainly indicates that Congress intended to create" a private right of action).

determining whether to *deny* a particular remedy. *Guardians*, 463 U.S. at 595 (opinion of White, J.); *Davis*, 442 U.S. at 246-47. This approach reflects a sound understanding of the respective roles of Congress and the courts. Where Congress has created a right of action, it is traditionally for the courts to determine what remedy is most appropriate to redress a particular violation. *See Republic Steel Corp.*, 362 U.S. at 492 ("Congress has legislated and made its purpose clear; it has provided enough federal law . . . from which appropriate remedies may be fashioned even though they rest on inferences."). The rule of *Bell v. Hood* gives a court the full range of remedies from which to choose, unless Congress explicitly has provided otherwise.

Second, the United States misreads this Court's opinion in *Transamerica Mortgage*. It does so by, once again, applying in a remedies context language that the Court used in determining whether a cause of action existed. *Compare* Brief for the United States in Support of the Petition for Certiorari at 14 *with Transamerica Mortgage*, 444 U.S. at 15 ("The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction."). The Court in *Transamerica Mortgage*, consistently with the principles explained above, denied a damages remedy to plaintiffs in that case only after determining that extensive and persuasive legislative history, and the terms of the statute itself, showed a congressional intent to deny legal damages to aggrieved plaintiffs. 444 U.S. at 21-22, 29-30 & n.6; *see also Bush v. Lucas*, 462 U.S. 367, 374-75, 378 (1983); *Cort*, 422 U.S. at 82-83 & n.14. Congress expressed no such intent when it enacted Title IX. In fact, the opposite is true. *See, e.g.*, 110 Cong. Rec. 5256 (1964) (Title VI; comments of Sen. Case) (cutoff of funds remedy is "not intended to limit the rights of individuals, if they have any way of enforcing their rights apart from the provisions of the bill, by way

of suit or any other procedure. The [cutoff of funds remedy] is not intended to cut down any rights that exist.").[9] *Transamerica Mortgage*, therefore, is perfectly consistent with the framework advanced above and the result urged by Petitioner.[10]

Finally, the United States seems to advocate that the Court disregard its well-established rules of construction because the availability of compensatory damages under Title IX would "give rise to a curious anomaly in the civil rights acts." Brief for the United States in Support of the Petition for Certiorari at 17. Such an "anomaly" would arise, the United States asserts, because a Title IX plaintiff suing to redress sex discrimination would have broader remedies than a Title VI plaintiff suing to redress race discrimination. *Id.* In addition, the United States asserts that it would be "especially anomalous" if the remedies to enforce the implied cause of action under Title IX were broader than those expressly granted for employment discrimination in educational institutions, under Title VII.[11] *Id.* at 18 n.15.

[9] *Cannon* itself forecloses any argument that Congress intended only those administrative remedies explicitly provided in Title IX to be available to aggrieved plaintiffs. *Cannon*, 441 U.S. at 705.

[10] One of the United States' primary grounds for inferring a congressional intent to deny a damages remedy for intentional violations of Title IX is that, at the time Congress enacted Title IX, courts construing Title VI had awarded primarily equitable relief. Brief for the United States in Support of the Petition for Certiorari at 16-17. Of course, that would provide no basis for ascertaining congressional intent at the time Title VI was passed. Thus, to the extent the Court accepts the United States' novel argument that Congress must have intended to create a damages remedy before the courts may award damages, one of the United States' primary methods of "illuminating" congressional intent under Title IX sheds no light at all on the intended remedies under Title VI.

[11] It generally has been held that compensatory damages are not available under Title VII. *See, e.g., Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982); *Pearson v. Western Elec. Co.*, 542 F.2d 1150, 1151-52 (10th Cir. 1976).

The asserted anomalies provide no basis for abandoning the normal rules of construction. It is not at all clear that the remedies under Title IX and Title VI will differ if compensatory damages are made available for intentional violations of Title IX. The United States asserts that such a conflict will arise because persons alleging employment discrimination on the basis of race in a federally funded program generally are remitted to their equitable remedies under Title VII. Brief for the United States in Support of the Petition for Certiorari at 17. But this Court has never passed on that issue, which would involve interpretation of provisions in Title VI that have no counterpart in Title IX.[12] It would be putting the cart before the horse for the Court to reject the interpretation of Title IX that is dictated by established

[12] Title VI provides that:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3 (1988). Title IX contains no analogous provision. The Court previously has noted this difference between Title VI and Title IX. *North Haven*, 456 U.S. at 529-30; *see also Darrone*, 465 U.S. at 631-34 & n.13. Of course, this difference does not suggest that compensatory damages should be available under Title IX but not under Title VI. It merely demonstrates that Congress itself intended Title IX to be somewhat broader in scope than Title VI. This intent of Congress is not anomalous or even surprising. Congress, in conjunction with Title VI, had enacted Title VII which dealt comprehensively with the national problem of race discrimination in employment. *See North Haven*, 456 U.S. at 536 n.26 ("this Court repeatedly has recognized that Congress has provided a variety of remedies, at times overlapping, to eradicate employment discrimination") (*citing International Union of Electrical, Radio & Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-39 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974)); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973).

rules of construction, merely to pursue symmetry with a proposed interpretation of a Title VI provision on which this Court has never ruled.[13]

As to Title VII, the purported anomaly reflects simply a different congressional prescription for a different type of ill. Title VII focuses exclusively on employment, while Title IX focuses on avoiding the use of federal funds to support discriminatory practices and giving individuals "effective protection against those practices." *Cannon*, 441 U.S. at 704. As in this case, the damages inflicted by violations of Title IX may not be primarily economic. By prescribing equitable remedies in Title VII, Congress evidently determined that persons who have suffered economic injuries due to race discrimination in employment, generally in a private context, should not have the same breadth of remedies as individuals who have suffered intentional discrimination by recipients of federal funds.[14]

II. THERE ARE NO ELEVENTH AMENDMENT OR OTHER CONSTITUTIONAL CONCERNS THAT WARRANT RESTRICTION OF THE REMEDIES AVAILABLE UNDER TITLE IX.

To justify its denial of a damages remedy, the court of appeals relied heavily on certain principles of federalism, rooted in the Eleventh Amendment and related notions of State autonomy, that come into play in inter-

[13] In any event, an individual who sues for race discrimination in employment *is* entitled to recover compensatory damages under 42 U.S.C. § 1981. *See Johnson*, 421 U.S. at 460.

[14] Even if the United States had provided a persuasive rationale for changing the rule of construction as to remedies, which it has not, the Court should not apply a new and different rule with respect to statutes passed when the *Bell v. Hood* rule of construction applied. *See Welch v. Texas Highways & Pub. Transp. Dep't*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring in part); *Transamerica Mortgage*, 444 U.S. at 32 n.8 (White, J., dissenting); *Cannon*, 441 U.S. at 698 nn.22 & 23; *id.* at 718 (Rehnquist, J., concurring).

preting federal statutes enacted pursuant to the spending power. Without expressly saying so, the court below apparently concluded that those concerns warrant departure from the "usual rule" of *Bell v. Hood* in determining what remedies are available against State or local governments for violation of a federal spending power statute. That conclusion, we submit, was erroneous.[15]

The principles on which the court of appeals relied were developed by this Court in *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981). The Court there noted the contractual nature of Spending Clause[16] enactments and the fact that such enactments frequently impose substantial financial and administrative burdens on State and local governments. Where Congress seeks to impose "*affirmative* obligations" on the States under its spending power, the Court concluded that it must do so clearly and unambiguously. *See Pennhurst*, 451 U.S. at 16-17 (emphasis in original).[17]

[15] The court of appeals also relied on the decision of the former Fifth Circuit in *Drayden v. Needville Indep. School Dist.*, 642 F.2d 129 (5th Cir. 1981), which rejected a claim for backpay under Title VI. This was error. After *Drayden* was decided, this Court unanimously ruled that a victim of intentional employment discrimination at the hands of a recipient of federal financial assistance may recover backpay as compensation. *Darrone*, 465 U.S. at 630-31. Thus *Drayden*'s rejection of any "right to recover backpay or other losses," and its sweeping assertion that the "private right of action allowed under Title VI encompasses no more than an attempt to have any discriminatory activity ceased," 642 F.2d at 133, have no current vitality.

[16] The Spending Clause, U.S. Const. art. I, § 8, cl. 1, states that Congress "shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States."

[17] The *Pennhurst* Court found support for its contractual analysis of Spending Clause legislation in Justice Cardozo's opinion for the Court in *Steward Machine Co. v. Davis*, 301 U.S. 548, 585-98 (1937). In *Steward Machine*, the Court upheld the constitutional validity of the federal Social Security tax system over the complaining tax-

Applying these principles in *Guardians*, 463 U.S. at 596-97, Justice White (joined by Chief Justice Rehnquist) expressed the view that only a prospective injunction should issue against a municipality whose hiring criteria were found to have excluded a disproportionate number of minority applicants, allegedly in unintentional violation of Title VI. Justice White reasoned that, in a case of unintentional discrimination, the defendant cannot properly be said to have violated the contractual conditions placed on its receipt of federal funds until such time as a court has identified the discriminatory impact of its conduct and announced what further costs and obligations it must undertake in order to comply with the law. He concluded that retrospective relief is inappropriate under those circumstances, because the recipient of funds—presented, for the first time, with a clear statement of the duties that it must assume should it continue to accept federal monies—is entitled to make an informed choice: The recipient may reject the contractual conditions by withdrawing from the federal assistance program entirely, *see Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970), or it may "voluntarily and knowingly" accept those conditions, "cognizant of the consequences of [its] participation" in the program, *Pennhurst*, 451 U.S. at 17. Finally, Justice White noted that the analysis he derived from *Pennhurst* and *Rosado* was roughly analogous to the Eleventh Amendment's general prohibition against retroactive relief in a federal-court action against a State official. *See Guardians*, 463 U.S. at 604 (citing *Edelman v. Jordan*, 415 U.S. 651, 665-67 (1974)).

Five members of the Court disagreed with the remedial limitations proposed by Justice White, arguing that the

payers' objection that Congress, by conditioning certain grants to the States on their own enactment of unemployment compensation laws, had resorted to "coercion of the States in contravention of the Tenth Amendment or of restrictions implicit in our federal form of government." *Id.* at 585.

Eleventh Amendment was inapplicable and that *Pennhurst*—itself an outgrowth of State sovereign immunity doctrine—addresses only the specificity with which Congress must legislate under the Spending Clause in order to create rights that are judicially enforceable against the States, and does not limit the remedies available when those rights have been violated.[18] Justices Stevens, Brennan, and Blackmun, as well as Justice Marshall in a separate opinion, rejected any inflexible rule limiting the remedies available under Title VI. *See Guardians*, 463 U.S. at 628-33, 636-38. Justice O'Connor, for the same reasons, rejected the proposed distinction between prospective and retrospective equitable relief, but found it unnecessary to address the availability of monetary damages, *see id.* at 612 & n.1, because she concluded that no violation of law had been established. And Justices White and Rehnquist cautioned that a *Pennhurst* contractual analysis might well lead to the opposite result in a Title VI case involving intentional discrimination, where there is "no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation." *Id.* at 597. In such situations, "it may be that the victim of the intentional discrimination should be entitled to a compensatory award . . . ." *Id.*

Pennhurst does not, as the court of appeals believed, prohibit the relief sought here.[19] Respondents' alleged

[18] The majority's disagreement with Justice White over the meaning and limits of *Pennhurst* mirrors the debate that divided the Seventh Circuit panel in *Lieberman v. University of Chicago*, 660 F.2d 1185 (7th Cir. 1981), *cert. denied*, 456 U.S. 937 (1982). *See id.* at 1189-92 (Swygert, S.J., dissenting).

[19] The court of appeals assumed that "Title IX, like Title VI, is Spending Clause legislation," Cert. Pet. App. 11, and therefore found "important guidance" in Justice White's application of Spending Clause principles in *Guardians*. But in *Guardians* the parties had not briefed the question of Title VI's constitutional origins, because

violation lies not in any failure to predict what hidden obligations and duties a court might declare to be implicit in Title IX, *cf. Guardians*, 463 U.S. at 597, but in a willful disregard of a clear and unambiguous statutory command. Where a recipient of federal funds has intentionally violated the unequivocal congressional mandate

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they, like the Congresses that enacted Title VI and Title IX, had no reason to anticipate that the answer to that question would affect the availability of particular remedies. In fact, there is compelling evidence that the 88th Congress enacted Title VI pursuant to Section 5 of the Fourteenth Amendment as well as its Article I power to spend for the general welfare. *See* 110 Cong. Rec. 1529 (1964) (Rep. McCulloch) ("[T]he Federal Government, through Congress, certainly has the authority, pursuant to the 14th amendment, to withhold Federal financial assistance where such assistance is extended in a discriminatory manner."); H.R. Rep. No. 914, 88th Cong., 1st Sess. pt. 2, at 1 (1963) ("[N]ot since Reconstruction has Congress enacted legislation fully implementing the [Fourteenth Amendment]. A key purpose of the bill, then, is to secure to all Americans the equal protection of the laws of the United States and the several states."); 110 Cong. Rec. 1527 (1964) (Rep. Celler) (suggesting that, although Title VI is undoubtedly valid as an exercise of the spending power, the Fifth and Fourteenth Amendments may of their own force prohibit the expenditure of public funds to support discriminatory programs and activities); *id.* at 13,333 (Sen. Ribicoff) (stating that Title VI enacts procedures for enforcing the Fourteenth Amendment). *See also Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 285-87 (1978) (opinion of Powell, J.).

There are many reasons, including the evolutionary nature of constitutional doctrines, that might lead Congress to invoke more than one of its constitutional powers in enacting civil rights or other remedial legislation. *See* Note, *The Eleventh Amendment and State Damage Liability Under the Rehabilitation Act of 1973*, 71 Va. L. Rev. 655, 679 & nn.174-77 (1985) ("Because at the time the [1964] Civil Rights Act was drafted, Congress could enforce the fourteenth amendment only against state governments, Congress applied Title VI to private recipients of federal aid through its broad article I powers.") (citing, *inter alia*, *The Civil Rights Cases*, 109 U.S. 3 (1883)). For the courts to limit the reach of a statute based on their judgment as to the predominant source of constitutional power invoked would effectively deny Congress its ability to base legislation on more than one.

accompanying those funds, the recipient should be held to the terms of its bargain and should "make whole" the victim of its misconduct.[20] The time for the recipient to shed an unwanted obligation not to discriminate, and to avoid liability for an intentional breach of that obligation, has long since past.

Pennhurst also does not control the result here because, three years after the Court decided *Guardians*, Congress explicitly rejected the importation of Eleventh Amendment principles into Title IX litigation. In the Civil Rights Remedies Equalization Act of 1986 ("Remedies

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[20] The United States, as *amicus curiae*, posits a distinction between permissible and impermissible make whole relief that turns on whether the relief "would threaten 'a potentially massive financial liability'" or whether, instead, it "'merely requires the [defendant] to belatedly pay expenses that it should have paid all along.'" Brief for the United States in Support of the Petition for Certiorari at 19 & n.17 (citations omitted). That distinction would, for no apparent reason, elevate the State sovereignty concerns noted in *Pennhurst* (*e.g.*, that a court should not lightly require the States to assume "open-ended and potentially burdensome obligations," 451 U.S. at 29) into a free-standing rule of statutory construction favoring restitutionary remedies over legal damages. There is no valid basis for such a rule. This Court's Eleventh Amendment cases draw no distinction between compensatory damages and restitution of benefits wrongly withheld. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 452 (1976) (an award of retroactive retirement benefits is a "damages award"). Nor does any such distinction follow, as the United States suggests, from Title IX's references to voluntary compliance with the law.

As the United States correctly notes, Title IX by its terms prohibits three distinct forms of misconduct by recipients of federal aid. *See* Brief for the United States in Support of the Petition for Certiorari at 15-16. A wrongful "exclusion from participation" may sometimes be cured by a prospective injunction, and an unlawful "denial of benefits" may sometimes be cured by relief in the nature of restitution. But the rule proposed by the United States would often provide no judicial remedy at all for having been "subjected to discrimination" in violation of Title IX. Such a gap in the statute's coverage would be wholly irrational.

Act"),[21] Congress not only eliminated any grounds for withholding retroactive relief under Title IX, but also rejected any distinction between legal and equitable relief.

Congress enacted the Remedies Act as part of the Rehabilitation Act Amendments of 1986, in response to this Court's decision in *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985).[22] The Act contains two substantive provisions. The first, 42 U.S.C. § 2000d-7(a)(1), withdraws the Eleventh Amendment immunity of the States under Title IX and related statutes. The second, 42 U.S.C. § 2000d-7(a)(2), goes further. Eschewing any distinction between legal and equitable relief under Title IX, the Remedies Act clarifies that, in a Title IX suit against a State, a federal court may provide "remedies both at law and in equity":

> In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.[23]

Congress obviously understood that remedies "at law" are available under Title IX, and acted to ensure that

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[21] Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d-7 (1988)).

[22] In *Atascadero*, the plaintiff sought "retroactive monetary relief" for an allegedly discriminatory refusal to hire—apparently the same equitable remedy approved in *Darrone*, 465 U.S. at 631—against two agencies of the State of California. This Court held the claim barred by the Eleventh Amendment.

[23] 42 U.S.C. § 2000d-7(a)(2) (1988). The statutes "referred to in paragraph (1)" of this subsection are Section 504 of the Rehabilitation Act, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq.*), Title VI of the Civil Rights Act of 1964, and "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." None of the enumerated statutes textually provides a damages remedy.

those remedies will be available against public as well as private defendants. If, as Respondents here contend, remedies "at law" are never available under Title IX, then the language chosen by Congress is effectively deleted from the statute. Such a result is strongly disfavored. *See Rosado*, 397 U.S. at 415 ("courts should construe all legislative enactments to give them some meaning"); *United States v. Menasch*, 348 U.S. 528, 538-39 (1955) (courts should "give effect, if possible, to every clause and word of a statute"); 2A N.J. Singer, *Sutherland Statutory Construction* § 46.06, at 104 (4th ed. 1984).

The legislative history of the Remedies Act further confirms that Congress understood that the federal courts were, and intended that they remain, free to provide a damages remedy under Title IX. Congress had assumed, before *Atascadero*, that money damages were available against the States, and *a fortiori* that money damages were available against other public entities and private parties. Thus, when Congress acted to "equalize" the remedies available against the States, it did so by "explicitly provid[ing] that in a suit against a State for a violation of any of these statutes, remedies, *including monetary damages*, are available to the same extent as they would be available for such a violation in a suit against any public or private entity other than a State." S. Rep. No. 388, 99th Cong., 2d Sess. 28 (1986) (emphasis added).[24]

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[24] If, as the court of appeals believed, the Remedies Act "*only* eliminates the sovereign immunity of States under the eleventh amendment," Cert. Pet. App. 10 (emphasis added), then the entire text of paragraph (a)(2) of the Act is simply read out of the statute. *Compare* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment . . . .") *with id.* § 2000d-7(a)(2) ("remedies (including remedies both at law and in equity) are available . . . ."). The Senate Report confirms that paragraph (a)(2) was intended to have independent significance. *See* S. Rep. No. 99-388, at 28 ("[T]he Rehabilitation Act Amendments of 1986 provide that states shall not be immune under the Eleventh Amendment from suit in Federal court. . . . Section 1003 also explicitly provides that

Senator Cranston, the author of the Remedies Act, voiced its underlying premise—the need for a federal damages remedy—quite plainly in explaining the urgency of its enactment.[25] He explained that the result in *Atascadero* was unacceptable because it left victims of discrimination by the States with only two choices: a "federal suit for an injunction against individual State officials" or "a suit in State court *for damages*." 132 Cong. Rec. 28,623 (1986) (emphasis added). He then cogently explained how the federal courts' inability or refusal to

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in a suit against a State for a violation of any of these statutes, remedies, including monetary damages, are available [against the State] . . . .").

Moreover, if Respondents' view were to prevail, then the 99th Congress, despite its reference to "remedies both at law and in equity," accomplished no more than to make retroactive equitable relief available in private actions in federal courts against the States; prospective relief was already available through the simple expedient of suing the responsible State official rather than the State itself, under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See Edelman v. Jordan*, 415 U.S. 651, 664 (1974) (State official prospectively enjoined to comply with federal regulations). Congress plainly believed that it was accomplishing more than this.

[25] The Remedies Act was incorporated into Title X of the Rehabilitation Act Amendments of 1986 after being offered as an amendment to the Senate bill by Senator Cranston. *See* S. Rep. No. 99-388, at 27. The original House bill (H.R. 4021) contained no comparable provision, but Senator Cranston's language was adopted by the Conference Committee without any material change, and the House passed the resulting version of H.R. 4021 containing Senator Cranston's provision by a vote of 408-0. *See* 132 Cong. Rec. 28,094-95 (1986).

Because the Conference Committee Report does not refer to Senator Cranston's amendment except to clarify its effective date, *see* H.R. Conf. Rep. No. 955, 99th Cong., 2d Sess. 78-79 (1986), and because the bill originally reported by the House Education and Labor Committee contained no equivalent provision, the only contemporaneous explanations of Congress's choice of the words "remedies both at law and in equity" are those in the Senate Report and those offered on the Senate floor by Senator Cranston, the amendment's author and primary sponsor.

award damages would thwart the remedial objectives of the civil rights laws:

> As to the limit on Federal remedies, litigation involving a claim of discrimination often takes years to resolve. Thus, where the [victim] is seeking employment or is trying to pursue an education or to participate in a project having only a 2- or 3-year life, an injunction may come too late to be [of] value in remedying the harm done through the unlawful discrimination. In a very real sense, the availability of only injunctive relief postpones the effective date of the antidiscrimination law, with respect to a State agency, to the date on which the court issues an injunction because there is no remedy available for violations occurring before that date.

Id. That is the unacceptable result that Congress sought to foreclose when it enacted the Remedies Act. Yet it is exactly the result that would follow from the court of appeals' holding in this case.

The United States offers a contrary reading of Senator Cranston's explanatory statement. Truncating his remarks beyond recognition, the Government asserts that Senator Cranston "carefully reserved" the question whether damages are available under Title IX. Brief for the United States in Support of the Petition for Certiorari at 20 n.18. That assertion is baffling. If the Senator did not believe that legal damages were recoverable against private parties, why then did he assume them to be recoverable against the States in their own courts? And if Congress did not intend that full retroactive relief be made available to victims of unlawful discrimination, why then did it reject the States' constitutional immunity as impermissibly "postpon[ing] the effective date of the antidiscrimination law"?

The Government's casual dismissal of the Remedies Act not only turns Senator Cranston's statement on its head, but also undermines the Government's own professed goal of effectuating the intent of Congress. If

the Remedies Act does nothing more, it forcefully demonstrates Congress's intent that the full range of the federal courts' remedial powers be available to compensate victims of unlawful discrimination. In the Remedies Act, Congress acted to overcome a constitutional barrier that prevented the courts from awarding damages under Title IX. If another barrier is to be erected, it cannot be done in the name of congressional intent.

CONCLUSION

For these reasons, the judgment of the court below should be reversed.

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(7)

No. 90-918

IN THE

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Respondents.

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BRIEF OF NATIONAL WOMEN'S LAW CENTER, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AMERICANS FOR DEMOCRATIC ACTION, CENTER FOR WOMEN POLICY STUDIES, COALITION OF LABOR UNION WOMEN, DISPLACED HOMEMAKERS NETWORK,

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INTEREST OF THE AMICI CURIAE

Amici curiae are organizations sharing a strong commitment to the eradication of all forms of sex discrimination in education, including sexual harassment, and to the full enforcement of Title IX. They therefore desire to present their perspective on this extremely important case.[1]

Congress enacted Title IX to prohibit the pervasive and destructive practice of sex discrimination in education. According to Senator Bayh, the chief Senator sponsor, Title IX afforded "a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972).

Title IX constitutes broad-based remedial legislation specifically designed to eliminate sex discrimination throughout education. Its sponsors understood that Title IX "reache[d] into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales." 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh). It extended to financial aid, 118 Cong. Rec. 5805, and admission to prestigious honorary societies, 118 Cong. Rec. 5811. It prohibited vocational education programs that were sex-segregated, "teachers who favor their male students, and guidance counselors who discourage [females] from many careers that have limited numbers of women in higher levels of administration." 117 Cong. Rec. 25507 (1971) (remarks of Rep. Abzug).

Moreover, as lower courts have uniformly found, the sex discrimination prohibited by Title IX includes the

[1] Both petitioner and respondent have consented to the filing of this brief; copies of the parties' consent letters have been filed with the Clerk. Attached as an appendix to this brief are statements of the individual organizations who have joined as *amici curiae*.

form of sex discrimination at issue in this case, sexual harassment.[2] As this Court held in the employment context, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

Sexual harassment is a particularly pernicious form of sex discrimination that remains a serious problem in schools and on campuses today.[3] It denies girls and women the very opportunity to take advantage of educational services and opportunities, often driving them from education altogether. It violates the direct prohibitory language of Title IX that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681.

Amici believe that Congress' goal of eliminating all forms of sex discrimination in education, which forms the

[2] *See, e.g., Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Moire v. Temple University School of Medicine*, 613 F. Supp. 1360 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986).

[3] Numerous references in the legislative history accompanying the passage of the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), make plain both the continuing nature of the problem and Congress' clear intent that sexual harassment constitutes a violation of Title IX. *See, e.g.*, S. Rep. No. 64, 100th Cong., 2d Sess. 12-13 (1987) (citing examples of sexual harassment cases dismissed under the doctrine of *Grove City College v. Bell*, 465 U.S. 555 (1984), to justify need for legislation); remarks of Senator Mitchell, 134 Cong. Rec. 388 (1988); remarks of Rep. Conyers, 134 Cong. Rec. 2939 (1988). While post-enactment history does not have "the weight of contemporary legislative history," the Court would be "remiss if [it] ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within 'the civil rights enforcement scheme' . . . ." *Cannon v. University of Chicago*, 441 U.S. 677, 686-87 n.7 (1979).

express basis for Title IX, would be thwarted if the Court were to affirm the decision below. The intentional and egregious discrimination suffered by Christine Franklin at the hands of the school district, which knowingly tolerated repeated sexual assaults against her, will go unremedied in the absence of a compensatory damages remedy. Moreover, without a damages remedy, a valuable deterrent to intentional sex discrimination will be lost.

SUMMARY OF ARGUMENT

1. Petitioner Christine Franklin was the victim of intentional sex discrimination in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (1988) ("Title IX"). The sole issue presented by this case is whether Ms. Franklin may obtain the damages remedy necessary to right the wrong she has suffered.

2. The existence of an implied right of action under Title IX is solidly grounded in the language, purposes, and legislative history of Title IX, as this Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). Continued adherence to *Cannon* is further justified by the implicit congressional ratification of *Cannon*'s holding in a 1986 enactment abrogating State sovereign immunity in actions under Title IX.

3. Title IX was enacted against the background of longstanding doctrines concerning the remedies available for violations of federal statutory rights. Compensatory damages are presumptively available for violations of rights under federal statutes unless there is a showing of congressional intent to the contrary. There is no indication in the legislative history of Title IX that Congress intended to abrogate the normal rule favoring the availability of a compensatory damage remedy. To the contrary, it is clear from the language and legislative history of Title IX that a compensatory damages remedy is

necessary to effectuate the purposes of Title IX. The propriety of a damages remedy is particularly clear where, as here, there is no other effective form of relief.

4. The decision in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981), that conditions attached to federal spending must be unambiguous to impose an obligation upon a State, did not narrow the scope of remedies traditionally available once a violation of a condition has been established. Further, even if the contractual analysis employed by the Court in *Pennhurst* were applicable to the question of remedies, compensatory damages would be available under such an analysis. Petitioner, as a member of the protected class of Title IX, is an intended third-party beneficiary of the "contract" and would therefore be entitled to damages under contract principles. *Pennhurst* is also inapplicable where the case, as here, involves intentional discrimination.

5. When Congress acted in 1986 to abrogate state sovereign immunity in actions under Title IX, it legislatively ratified the availability of damages. The Eleventh Amendment immunity shields State treasuries only from damages awards, not from injunctive relief. Congress must have intended in 1986 for damages to be available, as it legislated to expand their availability.

6. The available evidence concerning filings and damages awards in discrimination cases shows that the availability of compensatory damages under Title IX cannot be expected to lead to frivolous or excessive awards.

I. *CANNON'S* HOLDING THAT A PRIVATE RIGHT OF ACTION EXISTS UNDER TITLE IX FORMS THE BASIS FOR A TITLE IX COMPENSATORY DAMAGES REMEDY

The Court's holding in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX was intended to benefit individual victims of sex discrimination and therefore is enforceable by a private right of action, pro-

vides the predicate for Christine Franklin's entitlement to compensatory damages for the intentional discrimination she has suffered. The holding in *Cannon* is solidly grounded in the language, express purposes and legislative history of Title IX and is further confirmed by subsequent legislative and judicial developments.

As the Court emphasized in *Cannon*, the language of Title IX—"which expressly identifies the class Congress intended to benefit"—provides a compelling basis for inference of a private right of action. A private right of action is essential to effectuate the purposes of Title IX. "Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon*, 441 U.S. at 703-04.

The determination in *Cannon* is strongly supported by the legislative history. "[F]ar from evidencing any purpose to *deny* a private cause of action, the history of Title IX rather plainly indicates that Congress intended to create such a remedy." *Cannon*, 441 U.S. at 694 (emphasis in original). Further, Title IX's language is nearly identical to that of Title VI, and Title IX was intended to "be interpreted and applied as Title VI had been during the preceding eight years." *Id.* at 696 (footnote omitted). That intention is significant because "the critical language in Title VI had already been construed as creating a private remedy." *Id.*

Moreover, as Justice Rehnquist emphasized in his concurring opinion in *Cannon*, the intent of Congress in enacting Title IX must be interpreted in light of the contemporaneous state of the law. Justice Rehnquist accordingly recognized that "Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act, tended to rely to a large extent on the courts to *decide* whether there should be a private right of

action, rather than determining this question for itself." *Id.* at 718 (Rehnquist, J., concurring) (emphasis in original). As the Court noted, the state of the law when Congress enacted Title IX strongly favored implied causes of action. "In fact, Congress enacted Title IX against a backdrop of three recently issued implied-cause-of-action decisions of this Court involving civil rights statutes with language similar to that in Title IX. In all three, a cause of action was found." *Id.* at 698 n.22 (citations omitted). "In the decade preceding the enactment of Title IX, the Court decided six implied-cause-of-action cases. In all of them a cause of action was found." *Id.* at 698 n.23 (citations omitted).

The Court reaffirmed this analysis in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 378 (1982), stating that "[i]n determining whether a private cause of action is implicit in a federal statutory scheme when the statute by its terms is silent on the issue, the initial focus must be on the state of the law at the time the legislation was enacted." As discussed below, the contemporaneous law, embodying longstanding principles that continue to govern to this day, also favored the broad availability of damages remedies.

Not only was *Cannon* correct when decided, there are additional reasons today for continuing to recognize a private right of action under Title IX. The existence of a private right of action was affirmatively ratified by Congress through the enactment of the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 ("1986 Amendment"), in which Congress abrogated the Eleventh Amendment immunity of the States from suit under Title IX and various other anti-discrimination statutes.[4] While Congress did not intend to create any

[4] Section 2000d-7 reads as follows in pertinent part:

(a) General provision.

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in

new right of action in the 1986 Amendment, the inclusion of Title IX in the 1986 Amendment makes no sense unless it is construed as a congressional ratification of *Cannon*. This is not a situation, then, where the correctness of this Court's statutory interpretation is supported only by congressional acquiescence. Rather, Congress here has enacted legislation strongly indicating the correctness of this Court's decision.

The Court has applied the holding of *Cannon* to recognize private rights of action under parallel statutes in *Guardians Ass'n v. Civil Serv. Comm'n.*, 463 U.S. 582 (1983) (Title VI, upon which Title IX was patterned) and *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (Rehabilitation Act).[5] This Court's subse-

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Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. § 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. § 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

[5] Moreover, this Court's post-*Cannon* decisions regarding the implication of a private right of action support continued adherence to *Cannon* under the doctrine of *stare decisis*. *Stare decisis* is at its strongest with respect to a case such as *Cannon* involving statutory interpretation. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991). Moreover, this is not a case where any "special justifications," *Patterson*, 491 U.S. at 172-74, justify deviation from the doctrine of *stare decisis*. *Cannon* has not proven to be unworkable or confusing. *Id.* Further, *Cannon* is "consistent with our society's deep commitment" to the eradication of sex discrimination. *Id.*

quent decisions concerning implied rights of action under other statutes have reaffirmed that congressional "intent may appear implicity in the language or structure of the statute, or in the circumstances of its enactment," the basis for the Court's holding in *Cannon*.[6] Indeed, in his concurring opinion in *Thompson*, Justice Scalia contrasted the situation there presented with the implication of the right of action in *Cannon*, which was based on "statutory language that, in the judicial interpretation of related legislation prior to [its] enactment, . . . had been held to create private rights of action." *Thompson*, 484 U.S. at 191 (Scalia, J., concurring) (citations omitted).[7]

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[6] Recent cases in which the Court has declined to confer a private right of action do not bring the vitality of *Cannon* into question. In *Thompson v. Thompson*, 484 U.S. 174 (1988), for example, the intent of Congress to rely upon the operation of the Full Faith and Credit Clause, rather than to create a private right of action, was evident from the language and context of the statute. *Id.* at 180-186. In *California v. Sierra Club*, 451 U.S. 287 (1981), the language of the statute did "not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further," nor did the statute's legislative history or the context of its enactment reveal such a focus. *Id.* at 294-96. In *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), the Court refused to infer a private right of action where the statute expressly created a range of judicial and administrative enforcement mechanisms, *see id.* at 20, and there was no indication of congressional intent to permit a private right of action, in contrast to the intent underlying Title IX. *See* pp. 6-7 *supra*. In *Touche Ross & Co. v. Redington*, 442 U.S. 560, 569 (1979), the Court refused to infer a private right of action where the statute "neither confers rights on private parties nor proscribes any conduct as unlawful," which is plainly not the case with Title IX.

[7] This case is based solely on a claim of intentional discrimination. Accordingly, it does not implicate the holding in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983), unanimously reaffirmed by the Court in *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985), that while Title VI prohibits only intentional discrimination, its regulations properly reach disparate impact discrimination. Nor does it raise the issue of the applicability of that holding to Title IX. *Cf. Alexander v. Choate*, 469 U.S. at 294 n.11 (because of "fac-

It is against the clear intent of Congress to create a privately enforceable right in Title IX that the question of Ms. Franklin's claim to a compensatory damages remedy must be analyzed.[8]

II. COMPENSATORY DAMAGES, THE NORMAL REMEDY FOR A VIOLATION OF STATUTORY RIGHTS, ARE PERMISSIBLE UNDER TITLE IX

This case is governed by well-established principles that date back to the Framers' era and repeatedly have been embraced by this Court. Where a right of action exists under a federal statute, whether the right of action is express or implied, the presumption is that courts may provide relief using the full range of remedies, including damages. The presumption yields *only* where there is a clear indication of contrary legislative intent; the burden, then, is on those seeking to defeat the implication of a damages remedy. Here, the language, structure, context, and legislative history of Title IX demonstrate that Congress intended that the full range of remedies be available to those protected by its provisions.

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tors peculiar to Title VI," holding in *Guardians* that Title VI itself prohibits only intentional discrimination "would not seem to have any obvious or direct applicability to § 504."). This case does not present an occasion for the Court to address any of these issues.

[8] As this section demonstrates, there is no merit to the suggestion of the United States that this Court should reconsider its holding in *Cannon*. *See* Brief of the United States In Support of Petition for Certiorari (hereinafter "Br. of United States") at 9 n.6, 14 n.12. In this regard, it is noteworthy that the United States itself has previously taken the opposite position as to the existence of a private right of action under Title VI. *See Regents of Univ. of California v. Bakke*, 438 U.S. 265, 419 & n.26 (1978) (citing Supplemental Brief for the United States as *Amicus Curiae*). In any event, as the United States concedes, neither party has argued for the overruling of *Cannon*. Br. of United States at 14 n.12.

A. Violations Of Statutory Rights Are Normally Compensable By Damages Unless A Contrary Legislative Intent Can Be Shown

While federal courts are courts of limited jurisdiction, they have broad remedial authority in cases falling within their jurisdiction. As this Court has recognized repeatedly, "[t]he usual rule is that where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to afford full relief." *Guardians*, 463 U.S. at 595 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)). "Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Bivens v. Six Unknown Fed. Bureau Narcotics Agents*, 403 U.S. 388, 395 (1971). Compensatory damages is a "remedial mechanism normally available in the federal courts." *Id.* at 397. These principles, which have controlled since the early days of the federal judiciary, have their origins in English common law.

The common law rule favoring the availability of damages applies both in cases involving violations of constitutional rights and in cases involving violations of statutory rights. As the Court explained in *Texas and Pacific Ry. v. Rigsby*, 241 U.S. 33 (1916), where a violation of a statute

> results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, "Action upon Statute" (F), in these words: "So, in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."

Id. at 39 (citations omitted).

This Court has routinely implied the availability of compensatory damages both where the underlying right of

action was expressly created by statute, *see, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and where the underlying right of action was itself implied, *see, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Board of Comm'rs of Jackson Cty., Kan. v. United States*, 308 U.S. 343 (1939); *Rigsby, supra.*

In *Sullivan*, the Court implied the availability of damages under 42 U.S.C. § 1982. The Court acknowledged that "§ 1982 is couched in declaratory terms and provides no explicit method of enforcement," but held that courts could provide both equitable and legal remedies under the statute. 396 U.S. at 238. Citing *Rigsby* and *Bell v. Hood*, the Court stated that "[t]he rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired." 396 U.S. at 238-40.

Merrill Lynch is a recent decision in which the Court inferred the existence of both a private right of action and a damages remedy under that right of action. The Court's determination as to the existence of the right of action was based on an extensive analysis of the context and legislative history of the statute. Once the Court found the right of action to exist, however, it held damages to be available without any separate discussion of remedies. *See Merrill Lynch*, 456 U.S. at 378-88.

In *Wyandotte*, the United States sought to recover from the owners of an abandoned vessel the cost of removing that vessel. The United States argued that criminal penalties against the responsible parties and an *in rem* action against the abandoned vessel, the remedies expressly provided by the Rivers and Harbors Act of 1899, were not the exclusive remedies available to the United States in recovering its expenditures. The Court held that the injunctions and criminal penalties provided by the Act were

"inadequate to ensure full effectiveness of the statute which Congress had intended." *Wyandotte*, 389 U.S. at 202. The Court therefore implied a cause of action *in personam* against the vessel owners and implied the availability of damages. *Id.* at 205.

Moreover, limiting a victim of sex discrimination to injunctive relief is directly contrary to the traditional preference in the federal courts for monetary relief. *See O'Shea v. Littleton*, 414 U.S. 488, 499 (1974) (citing *Younger v. Harris*, 401 U.S. 37, 43-44 (1971)); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959). There is consequently no merit to the position of the United States that injunctive relief should be the sole remedy unless the statute is "framed in terms suggesting that awards of damages are *essential* for effective enforcement." Br. of United States at 15 (emphasis added).[9]

The preference for legal relief has its origins in the English common law. As the Court noted in *Whitehead v. Shattuck*, 138 U.S. 146, 150-51 (1891):

> The sixteenth section of the Judiciary Act of 1789, . . . declared "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law" . . . . The provision is merely declaratory, making no alteration whatever in the rules of equity on the subject of legal remedies, but only expressive of the law which has governed proceedings in equity ever since their adoption in the courts of England.[10]

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[9] Equitable remedies are, however, both authorized and appropriate in response to a violation of Title IX, as seven members of the Court found with respect to Title VI in *Guardians*. *See* 463 U.S. at 606-07 (White, J., joined by Rehnquist, J.); *id.* at 612 (O'Connor, J.); *id.* at 634 (Marshall, J.); *id.* at 636 (Stevens, J., joined by Brennan, J., and Blackmun, J.).

[10] *See also* C. McCormick, *A Handbook on the Law of Damages* 1 (1935).

The rule in federal courts, then, normally has been to permit legal remedies, and not to prefer equitable relief over legal relief in remedying statutory violations. Accordingly, where a federal statutory right has been violated, the implication of a damages remedy has long been the presumptive response.

B. Because There Is No Indication Of A Legislative Intent To Foreclose Compensatory Damages Under Title IX, Awards Of Compensatory Damages Are Permissible

This court has normally implied the availability of compensatory damages in the absence of a contrary legislative intent. *See* pp. 11-14, *supra*. Thus, the Court in *Wyandotte* indicated that it would deny the availability of damages only "[i]f there were no other reasonable interpretation of the statute, or if petitioners could adduce some persuasive indication that their interpretation accords with the congressional intent. . . ." *Wyandotte*, 389 U.S. at 200. "[I]n the absence of any contrary indication by Congress, courts may provide private litigants exercising implied rights of action whatever relief is consistent with the congressional purpose." *Transamerica Mortgage Advisors*, 444 U.S. at 30 (White, J., dissenting).

The same rule of construction governs here. In determining whether to imply the availability of damages, as in determining whether to imply a right of action, "the initial focus must be made on the state of the law at the time the legislation was enacted." *Merrill Lynch*, 456 U.S. at 378; *see also Thompson*, 484 U.S. at 179-80. Congress enacted Title IX against the background of the longstanding rule favoring the availability of compensatory damages. Not only is there no indication whatsoever in the legislative history that Congress intended to limit the normal range of remedies, the legislative history instead shows that Congress above all was concerned

about protecting the rights of victims of discrimination and envisioned a broad remedial scheme.[11] This is plain, for example, from the statements of Senator Bayh, the chief Senate sponsor of Title IX, who repeatedly described that legislation as a "strong and comprehensive measure" that would offer women "solid legal protection" from discrimination in education. *See, e.g.*, 118 Cong. Rec. 5804, 5807 (1972). Senator Bayh fully understood that Title IX's remedial scheme would reach broadly and expected that it would produce "a revolutionary impact on our American system of higher education." 117 Cong. Rec. 30155 (1971).[12]

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[11] One indicia of legislative intent to which the Court has looked in some cases is whether there are other remedies provided expressly by the statute. *See, e.g., Transamerica Mortgage Advisors*, 444 U.S. at 19-21. In *Transamerica*, the Court indicated that "where a statute expresly provides a particular remedy or remedies, a court must be chary of reading other remedies into it." *Id.* at 19. However, such a consideration simply cannot be applied to this case, as it would render meaningless the private right of action under Title IX, which the Court in *Cannon* found to exist. In fact, this Court in *Cannon* rejected the position that the administrative mechanism expressly provided for was the exclusive remedy under Title IX:

> The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.

441 U.S. at 705-06.

[12] The legislative history of Title VI, upon which Title IX is modeled, provides further support. Addressing the non-exclusivity of the defunding remedy, Senator Ribicoff explained that "[i]n most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy." 110 Cong. Rec. 7067 (1964). *See also* remarks of Senator Humphrey, 110 Cong. Rec. 6545 (1964) (contemplating enforcement of Title VI through "litigation by private parties" with no reference to a limitation on remedies); remarks of Representative Lindsay, 110 Cong. Rec. 1540 (1964) ("Everything in this proposed legislation has to do with a body of law which will surround and protect the individual . . . .").

In enacting the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988), Congress reaffirmed its intent that Title IX should be broadly construed to provide an effective remedy against the evils of sex-discrimination. As the Senate Report states:

> In enacting the four civil rights statutes [Title IX, Title VI, Section 504, and the Age Discrimination Act], Congress intended that each be broadly interpreted to provide effective remedies against discrimination. . . . It was understood at the outset that the task of eliminating discrimination from institutions which receive federal financial assistance could only be accomplished if the civil rights statutes were given the broadest interpretation.

S.Rep. No. 64, *supra*, at 5. *See also id.* at 7 ("The inescapable conclusion is that Congress intended that Title VI as well as its progeny—Title IV, Section 504, and the ADA—be given the broadest interpretation.")

In light of the absence of any indication that Congress intended to alter the traditional rules preferring compensatory damages and authorizing the judiciary to provide a damages remedy in cases of intentional discrimination, petitioner should be permitted to seek such damages.

C. The Availability Of Compensatory Damages Is Particularly Warranted Where, As Here, Equitable Relief Will Not Redress Plaintiff's Injury

The present case is clearly an instance where compensatory damages are the only effective means of remedying plaintiff's injuries. Neither an order enjoining further discriminatory activity nor a cut-off of funds to the institution would provide any remedy at all to Christine Franklin, who is no longer a student at North Gwinnett High School. "Injunctive or declaratory relief is useless to a person who has already been injured." *Butz v. Economou*, 438 U.S. 478, 504 (1978). For Christine

Franklin, "'it is damages or nothing.'" *Id.* at 504-05 (quoting *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 410 (1971)).

Moreover, this case offers a classic example of the limitations of the defunding remedy. Not only does it make "little sense to impose" on Ms. Franklin "the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cut-off of federal funding is appropriate," *Cannon*, 441 U.S. at 705, a fund termination order would provide no remedy at all for Ms. Franklin's injuries—even if she still were a student.

A damages remedy is also especially important in the area of education because claims often are time-consuming to adjudicate and the student may no longer be in school when a decision is finally rendered. The plaintiffs encountered this same dilemma in *Alexander v. Yale University*, 631 F.2d 178, 185 (2d Cir. 1980), where a claim of sexual harassment was dismissed because "[n]o money damages have been requested and . . . graduation has mooted [the plaintiffs'] claims for grievance procedures"). Thus, in the absence of a damages remedy, a sex discrimination claim might never be adjudicated at all, thus frustrating the central purpose of Title IX.

To eliminate compensatory damages from the range of remedies available under Title IX, then, would leave petitioner a statutory right without a remedy. Yet, *ubi jus, ibi remedium:* "'every right, when withheld, must have a remedy, and every injury its proper redress.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Black Comm. 109)). "[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell v. Hood*, 327 U.S. 678, 684 (1946) (footnote omitted). *Accord J. I. Case Co. v. Borak*, 377 U.S. 426, 433-35 (1964). Consequently, the implication of a damages rem-

edy is particularly justified where, as here, there is no other effective form of relief.

III. *PENNHURST* DOES NOT APPLY TO THE DETERMINATION OF THE AVAILABLE REMEDIES HERE

The court below erred in relying upon *Pennhurst* to deny a remedy of compensatory damages under Title IX. *Pennhurst* involved the determination of whether a State had accepted a substantive obligation pursuant to a funding statute. However, it has never been established that Title IX is solely a funding statute. *Amici* do not agree that it is, based on the strong Fourteenth Amendment implications in its purpose and history. Even assuming that Title IX is a spending clause enactment, *Pennhurst* addressed neither the nature of the remedies available for violations of the statute nor the traditional rule favoring damages for violations of federal statutes. Moreover, even if a *Pennhurst* contractual-type analysis were applicable to determining the available remedies under Title IX, such an analysis would confirm rather than defeat the availability of damages.

A. *Pennhurst* Did Not Reverse The Rule Favoring The Availability Of Compensatory Damages

In concluding that compensatory damages were unavailable under Title IX, the court below, citing Justice White's opinion in *Guardians*, 463 U.S. at 596-97, mistakenly relied upon *Pennhurst*. Based on the premise in *Pennhurst* that legislation providing grants to states pursuant to the Spending Clause of the Constitution is contractual in nature, the court below determined that the availability of remedies under Title IX must be construed narrowly. The decision in *Pennhurst*, however, pertains only to the existence of a substantive obligation under a Spending Clause statute, not to the range of remedies available upon a State's violation of an obligation which is undisputed.

In *Pennhurst*, a patient of a Pennsylvania hospital brought suit to challenge conditions at the hospital, claiming that the conditions violated, *inter alia*, rights granted by the Developmentally Disabled Assistance and Bill of Rights Act. Finding that the legislation was enacted pursuant to the Spending Clause and not the Fourteenth Amendment, the Court addressed the sole issue before it: whether § 6010, the "bill of rights" provision, was a condition that the State needed to satisfy to receive federal funding. The Court concluded that Congress did not intend § 6010 to be a condition, but meant it instead as an expression of congressional preferences. *See Pennhurst*, 451 U.S. at 18-20. The conclusion was based on the premise that the "legitimacy of Congress' power to legislate under the spending power rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Id.* at 17. Thus, the Court noted that conditions must be unambiguous for them to confer substantive "rights" upon private parties and to impose corresponding obligations upon the State. *See also South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

The Court's reasoning in *Pennhurst* has no bearing whatsoever on the issue of damages presented in this case. The Court simply did not speak to the issue of what remedies would be available to private litigants if the statute had imposed a substantive duty of care upon the State. *Pennhurst* applied the contract law analysis discussed above to determine whether the statute imposed specific obligations upon the receipt of federal funds. Such an analogy is wholly inapposite to the instant case:

> *Pennhurst* concerned what obligations were imposed upon recipients of funds, not what consequences flow from a violation of statutory conditions. In the present case, it is not disputed that Title IX is a condition of a receipt of federal funding. Thus, the analysis in *Pennhurst* is simply irrelevant.

Lieberman v. University of Chicago, 660 F.2d 1185, 1190 (7th Cir. 1981) (Swygert, J., dissenting), *cert. denied*,

456 U.S. 937 (1982). *See also Guardians Ass'n*, 463 U.S. at 636-37 (Stevens, J., dissenting) ("*Pennhurst* . . . concerned the existence or nonexistence of statutory rights, not remedies.").

The case principally relied upon by the *Pennhurst* Court, *Rosado v. Wyman*, 397 U.S. 397 (1970), is likewise inapplicable. Plaintiffs in *Rosado* challenged the compatibility of the New York Social Services Law with the Social Security Act, a funding statute, because New York was providing lesser payments to Aid to Families With Dependent Children (AFDC) recipients in Nassau County than to recipients in New York City. The Court granted the plaintiffs' request for an injunction against the payment of federal funds.

The *Rosado* Court never discussed the payment of damages. It did observe that "the State had alternative choices of assuming the additional cost *of paying benefits to families* . . . or not using federal funds to pay welfare benefits according to a plan that was inconsistent with federal requirements." *Id.* at 421 (emphasis added). The additional costs to which the Court referred in *Rosado*, however, were necessary to satisfy the terms of the contract; they were not damages to be paid for violating it.

Thus, neither *Pennhurst* nor *Rosado* cast doubt on the traditional rule of damages where Spending Clause enactments are involved.

B. Even Under The Contract-Type Analysis Of *Pennhurst*, Compensatory Damages To Third-Party Beneficiaries Are Permissible

Even if the contract-type analysis of *Pennhurst* were applicable to the issue of remedies here, it supports the availability of compensatory damages. Under contract law analysis, petitioner's situation would best be analogized to that of a third-party beneficiary under a con-

tract. Unquestionably, damages are an established remedy for such third-party beneficiaries.

Persons protected by Title IX satisfy the test for third-party beneficiaries. According to the *Restatement (Second) of Contracts* § 304 (1981), a "promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." A beneficiary, in turn, is an intended beneficiary "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and . . . the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Id.* at § 302.

Women, such as petitioner Christine Franklin, are intended beneficiaries of Title IX because they are among those intended to receive "the benefit of the promised performance" of Title IX. *Id.* Title IX states that "[n]o person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). This statutory language shows "an unmistakable focus on the benefited class," and it "explicitly confers a benefit on persons discriminated against on the basis of sex. . . ." *Cannon*, 441 U.S. at 691, 694.[13]

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[13] The concerns raised by Justice White in *Guardians Association* in connection with the third-party beneficiary theory do not justify rejection of that theory. First, Justice White stated that Congress "may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs." 463 U.S. at 603 n.24. There is no indication in the legislative history, however, that Congress actually concluded that the risk of dissuading participation in federal programs outweighed the "salutary deterrent effect of a compensatory remedy." *Id.*

Second, Justice White cited the *Restatement* § 313 for the proposition that "a party who contracts with a government agency to

It is well settled that third-party beneficiaries may sue for damages. *See, e.g., United States v. Allstate Ins. Co.*, 910 F.2d 1281 (5th Cir. 1990); *Cunningham v. Healthco, Inc.*, 824 F.2d 1448, 1455-57 (5th Cir. 1987); *Dunn Appraisal Co. v. Honeywell Information Systems, Inc.*, 687 F.2d 877, 884-85 (6th Cir. 1982). *See also* E. Farnsworth, *Contracts* 734 (1982); *Corbin on Contracts* § 810, at 230 (1951); *Restatement, supra*, at § 307 comment a. Further, lower courts have found that damages may be awarded to third-party beneficiaries of contracts pursuant to spending power statutes. *See, e.g., Holbrook v. Pitt*, 643 F.2d 1261, 1276 (7th Cir. 1981) (holding that tenants in housing projects could recover retroactive benefits from HUD as third-party beneficiaries of Section 8 contracts). *See also Organization of Minority Vendors, Inc. v. Illinois Cent. Gulf R.R.*, 579 F. Supp. 574, 594 & n.10, 596-601 (N.D. Ill. 1983) (denying motion to dismiss third-party beneficiary claim of minority business enterprises under section 905(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, which is modeled on Title VI, and also discussing the availability of damages).

C. Where the Statutory Violation Was Intentional, A Damages Remedy Is Consistent With Even The Most Expansive Application Of *Pennhurst*

Again assuming *arguendo* the applicability of a *Pennhurst*-based contract analysis to the question of Title IX remedies, Ms. Franklin is entitled to compensatory dam-

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do an act or render a service to the public is generally not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform." *Id.* This section of the *Restatement* also explains in Comment a that "individual members of the public are treated as incidental beneficiaries *unless a different intention is manifested.*" *Restatement (Second) of Contracts* § 313, Comment a (1981) (emphasis supplied). As discussed above, however, Congress clearly manifested the intention to make individual members of the public beneficiaries of Title IX.

ages precisely because there can be no suggestion that the nature of this obligation was ambiguous or that the recipient was "unaware of the condition[] or . . . unable to ascertain what is expected of it." 454 U.S. at 17. Surely respondent Gwinnett County Public Schools "was aware of the obligation" under Title IX to refrain from the intentional sexual harassment complained of by Christine Franklin. Since there can be no concern that the recipient will be subjected to an unfair or unanticipated liability through the imposition of a damages remedy, such a remedy is fully appropriate. Justice White explained in *Guardians*,

> [i]n cases where intentional discrimination has been shown, there can be no question as to what the recipient's obligation under the program was and no question that the recipient was aware of that obligation. In such situations, it may be that the victim of the intentional discrimination should be entitled to a compensatory award, as well as to prospective relief in the event the State continues with the program.

Guardians, 463 U.S. at 597 (opinion of White, J.).

Indeed, a majority of the Justices in *Guardians* distinguished the availability of damages in cases involving intentional discrimination, such as the instant case, from cases involving unintentional discrimination, as in *Guardians*. *See Guardians*, 463 U.S. 602-03, 606-07 (White, J., announcing the judgment of the Court, joined by Rehnquist, J.); *Id.* at 610-11 (Powell, J., concurring, joined by Burger, C.J. and Rehnquist, J.); *Id.* 615 (O'Connor, J., concurring). Relying on that distinction, the Third Circuit in *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990), held that the plaintiff, a victim of intentional discrimination and violation of Title IX, was entitled to compensatory damages based on *Guardians*. *See id.* at 787-88. As the United States notes, the only appellate decisions other than the instant case to deny damages under Title IX for intentional discrimina-

tion were decided before *Guardians*. *See* Br. of United States at 12-13.

Thus, compensatory damages are especially appropriate in this case involving intentional discrimination.

IV. IN ENACTING THE CIVIL RIGHTS REMEDIES EQUALIZATION AMENDMENT OF 1986, CONGRESS RATIFIED THE AVAILABILITY OF COMPENSATORY DAMAGES

Congressional action following this Court's decision in *Cannon* confirms the existence of a cause of action for damages. As noted in Part I, *supra*, Congress affirmatively ratified the existence of a private right of action through the enactment of the Civil Rights Remedies Equalization Amendment of 1986, 42 U.S.C. § 2000d-7 ("1986 Amendment"), which abrogated the Eleventh Amendment immunity of the States from suit under Title IX and certain other anti-discrimination statutes. The 1986 Amendment strongly supports not only the existence of a private right of action, but also the availability of compensatory damages.

The Eleventh Amendment immunity shields State treasuries only from damages awards, not from prospective injunctive relief. *See Edelman v. Jordan*, 415 U.S. 651, 663-71 (1974). When a state official is named, the Eleventh Amendment is no barrier to suits under Title IX for purely injunctive relief. The only change created by the 1986 Amendment was to eliminate the immunity of State treasuries from *damages* awards rendered pursuant to federal anti-discrimination statutes such as Title IX.

The 1986 Amendment therefore constitutes congressional ratification of the availability of compensatory damages under Title IX. The construction of Title IX advanced by petitioner is the only one that coheres with the 1986 Amendment. It would have been reasonable for Congress to have permitted compensatory damages under

Title IX without overriding State sovereign immunity, but it would have been pointless for Congress to have overridden State sovereign immunity for Title IX claims without permitting compensatory damages.

V. CONTRARY TO THE CONTENTION OF THE UNITED STATES, THE AVAILABILITY OF COMPENSATORY DAMAGES UNDER TITLE IX WOULD NOT LEAD TO FRIVOLOUS OR EXCESSIVE AWARDS

The United States has raised the specter of "a potentially massive financial liability," Br. of United States at 19, as a policy reason to reject a compensatory damages remedy under Title IX.[14] The United States offers no support for that proposition, however. The available evidence indicates, to the contrary, that damages awards in civil rights cases are limited in number and both appropriate and modest in amount.

Professors Theodore Eisenberg and Stewart Schwab prepared a thorough review of the research on precisely this question, considering a broad range of statutes providing damages remedies.[15] Following an examination of

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[14] The United States further argues against the creation of a damages remedy under Title IX on the grounds that it would be "anomalous" to create a broader remedy for sex discrimination in employment under Title IX than exists for race discrimination under either Title VI, 42 U.S.C. § 2000d, which has a more limited applicability to employment discrimination (although the nature of the limitation has not been clearly established), or Title VII, 42 U.S.C. §§ 2000e *et seq.*, which does not include a damages remedy. Br. of United States at 17-18. This argument disregards the availability of damages for claims of race discrimination in employment under other federal statutes, principally including 42 U.S.C. § 1981. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

[15] *See Hearings on H.R. 4000, Civil Rights Act of 1990, Joint Hearings Before the House Committee on Education and Labor*, 101st Cong., 2d Sess. vol. 2, at 142-71 (1990) (hereinafter "Hearings on H.R. 4000").

the propensity of discrimination victims to sue, they concluded that "[f]ar from revealing that potential discrimination claimants are eager to sue, the data show that discrimination victims are substantially less likely to file a legal action than are other disputants. The notion of the existence of a huge army of potential claimants waiting to exploit any marginal change in civil rights laws is not supported by any data." *Id.* at 152-53. Their conclusion is bolstered by a review of civil rights filings following the enactment of the Civil Rights Attorneys Fees Awards Act, 42 U.S.C. § 1988. The data show that civil rights filings covered by the Act increased at a substantially lower rate than other filings. *Hearings on H.R. 4000, supra,* at 153.

Second, Eisenberg and Schwab found that "[t]here is little evidence that victims are overcompensated by compensatory damages." *Id.* at 146. A recent study of damages awarded in all reported employment discrimination cases under 42 U.S.C. § 1981 from the period 1980 through 1990 likewise found that damages awarded by federal courts in discrimination cases are infrequent and modest. *See* Statement of Wendy S. White, Daniel W. Shelton & A. Mechele Dickerson entitled "Analysis of Damage Awards Under Section 1981," *Hearings On H.R. 1, The Civil Rights Act of 1991 Before the House Committee On Education And Labor*, 102d Cong., 1st Sess. 345 (1991). This study examined 121 reported cases in which an employer was held to have engaged in intentional racial discrimination. *Id.* at 349. Of those cases, only 69 cases resulted in an award of damages; the others resulted only in equitable remedies. *Id.* at 349-50. Furthermore, 42 of those awards—nearly two-thirds—were less than $50,000. *Id.* at 350.

Finally, a review of the federal reporters reveals very few Title IX cases at all in the twelve years since this Court decided *Cannon*. This is so despite the existence of the Civil Rights Attorneys Fees Awards Act of 1976,

permitting prevailing Title IX plaintiffs to recover their attorneys' fees. The "floodgates" argument is simply not based on fact and is not a legitimate basis for denying the normal range of remedies to victims of sex discrimination. *See Cannon*, 441 U.S. at 709-10.

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded.

Respectfully submitted,

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APPENDIX

APPENDIX

STATEMENTS OF INDIVIDUAL AMICI CURIAE

The National Women's Law Center is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* It has a deep and abiding interest in assuring the availability of appropriate and effective remedies under Title IX, including monetary damages.

Founded in 1915, the American Association of University Professors (AAUP) is the nation's oldest and largest organization dedicated to advancing the interests of higher education from the perspective of faculty concerns. For many years and in many settings, AAUP has stressed that the full and fair enforcement of Title IX and other laws against discrimination is essential to combatting bias in American colleges and universities.

The American Association of University Women (AAUW) promotes equity for women, education and self-development over the life span, and positive societal change. AAUW includes 140,000 members nationwide and 1,700 local branches. Vigorous enforcement of Title IX is an AAUW priority.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan, membership organization dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. The ACLU of Georgia is a state-wide affiliate of the ACLU.

The Americans for Democratic Action (ADA), a progressive, independent political organization, is a national coalition of civil rights and feminist leaders, academi-

cians, business people and trade unionists, grass roots activists, elected officials, church leaders, professionals, members of Congress and many others.

The Center for Women Policy Studies (CWPS) is a non-profit feminist organization founded in 1972. CWPS is dedicated to research and advocacy to further women's rights. One of CWPS' priorities is the achievement of educational equity. To that end CWPS supports a broad and effective interpretation of Title IX.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of more than 65 international unions. CLUW has 45 active chapters and a National Executive Board composed of the female leadership of these international unions. A primary purpose of this national coalition is to remove all forms of discrimination from the workplace.

The Displaced Homemakers Network is comprised of over 1,000 local programs that provide education and training services to midlife and older women seeking to enter and re-enter the job market. The Network seeks to increase displaced homemakers' options for economic self-sufficiency.

Equal Rights Advocates, Inc., is a San Francisco-based public interest legal and educational corporation specializing in the area of sex discrimination. Since its inception over seventeen years ago, ERA has litigated cases and pursued public policies aimed at improving the condition of women and promoting the equality of the sexes under law.

The National Association for Girls and Women in Sport (NAGWS) is a non-profit organization for girls and women in sport. One of their basic interests is in achieving sex equity for athletes. We believe that discrimination cannot continue and, therefore, are in support of this *amicus* brief.

The National Council of La Raza (NCLR), the largest constituency-based national Hispanic organization, exists to improve life opportunities for the more than 22 million Americans of Hispanic descent. As a long time advocate of all Hispanics' rights to equal educational opportunities and to fair treatment in educational institutions, NCLR recognizes the importance of opposing any attempts to narrow the intended protections and remedies of Title XI. Title XI is of special importance to NCLR because Hispanic women may be vulnerable to multiple forms of prohibited discrimination—national origin and race, as well as gender. We must, therefore, be vigilant in our efforts to preserve the strength of all existing civil rights protections that benefit Hispanic women. NCLR would like to join the National Women's Law Center in its *amicus* brief to show its unqualified support for the position that a damages remedy is available under Title XI for an intentional violation of that statute.

The National Education Association (NEA) is a nationwide labor organization with more than two million members, the vast majority of whom are employed by public school districts, colleges and universities. One of the principal purposes of the NEA is to protect its members from gender discrimination by educational institutions.

The National Organization of Women, Inc. (NOW) is the largest feminist organization in the United States, and has as its goal to bring full equality to women. Essential to that goal is equal educational opportunity for all women and girls. From its inception NOW has worked on issues of equal education including Title IX and the Civil Rights Restoration Act restoring the full scope of Title IX. NOW has a strong interest in cases such as this one which seek to ensure remedies for victims of discrimination through rigorous enforcement of Title IX.

The NOW Legal Defense and Education Fund is one of the nation's foremost nonprofit advocacy organizations

dedicated to the elimination of sex discrimination. Since its inception in 1970, the NOW Legal Defense and Education Fund has been involved in many federal and state cases concerning the issues of sexual harassment, education and women's civil rights. NOW Legal Defense and Education Fund is especially concerned with the issues raised in this case because of the importance of ensuring that women and girls receive non-discriminatory education under non-discriminatory conditions.

The Older Women's League (OWL) was founded in 1980 to address the concerns of midlife and older women. It currently has over 20,000 members and donors and over 100 chapters in 36 states. Equitable access to education and education-related employment opportunities is essential to midlife and older women's economic security.

Women Employed is a national membership association of working women. Over the past sixteen years, the organization has assisted thousands of women with problems of discrimination, monitored the performance of equal opportunity enforcement agencies, analyzed equal opportunity policies, and developed specific, detailed proposals for improving enforcement efforts.

The Women's Law Project (WLP) is a nonprofit law firm dedicated to advancing the status and opportunities of women through litigation, public education and public policy advocacy. WLP has a strong interest in the availability of strong and effective remedies under Title IX of the Education Amendments of 1972, including compensatory damages.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide *pro bono* legal assistance to women who have been victims of race and sex discrimination. The Fund has devoted significant resources to combatting sex and race discrimination in federally-assisted programs and activities. The outcome of this case has far-reaching implications for women and minorities, as well as for handicapped persons, who have

been subjected to illegal discrimination by institutions receiving federal financial assistance and who are seeking to vindicate their legal rights.

The Women's Sports Foundation (Foundation), a nonprofit educational organization which fosters the participation of women in all forms of sport and which insists that there be equal opportunities for women in athletics, joins in the brief of Amicus Curiae. The Foundation believes that in order to ensure a right to equal opportunities in sport for women, as provided by Title IX of the Education Amendments of 1972, that an integral part of the right includes the opportunity to obtain money damages in appropriate cases.